No. 89-1185

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY, *et al.*,
Petitioners,

v.

COMITE PRO RESCATE DE LA SALUD, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Resource Conservation and Recovery Act's domestic sewage exclusion for "solid or dissolved material in domestic sewage," 42 U.S.C. § 6903(27), is confined to waste emanating from houses, or whether the exclusion also covers sewage from factories that contains waste from factory restrooms, showers, cafeterias, clinics and other employee facilities.

2. Whether an *amicus curiae* brief filed on behalf of the EPA with the court of appeals is entitled to deference as a statement of agency policy and statutory interpretation.

3. Whether EPA's construction of RCRA's domestic sewage exclusion is entitled to deference as a statement of agency policy or statutory interpretation when EPA never publicly articulated such a construction aside from the arguments in the *amicus curiae* brief it filed with the court of appeals.

PARTIES TO THE PROCEEDING

Petitioners not named in the caption are Bristol Myers Company, Bristol Caribbean, Inc., Bristol Laboratories Corporation, The Perkin-Elmer Corporation, Perkin-Elmer Caribbean Corporation, Puerto Rico Industrial Development Company, Sea Electronic Aids, Inc., Storage Technology Corporation, Storage Technology de Puerto Rico, Inc., Westinghouse de Puerto Rico, Inc. and Westinghouse Electric Corporation.*

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* Pursuant to Supreme Court Rule 29.1, petitioners' parent and subsidiary corporations are as follows:

1. Petitioner Bristol Myers Company is a publicly held corporation that is the parent corporation of petitioners Bristol Caribbean, Inc. and Bristol Laboratories Corporation. All of the subsidiaries of Bristol Myers Company, Bristol Caribbean, Inc. and Bristol Laboratories Corporation are wholly owned except for the following foreign subsidiaries of Bristol Myers Company: Bristol Myers Lion Ltd., S.M.I. Bristol, Boryung Bristol Ltd., Bristol Myers S.A., Bristol Hellas A.E.B.E., P.T. Bristol Myers, 2903 Realty Corp., Institute Biomedico S.A. de C.V., and Servicios Biomedicos de Compresion.

2. Petitioner The Perkin-Elmer Corporation is a publicly held corporation that is the parent corporation of Perkin-Elmer Caribbean Corporation. Other than shares owned by directors for qualifying purposes, all of the subsidiaries of The Perkin-Elmer Corporation and Perkin-Elmer Caribbean Corporation are wholly owned except for the following direct and indirect foreign subsidiaries of the Perkin-Elmer Corporation:

Bodenseewerk Geraetetechnik Beteiligungs und Verwaltungsgesellschaft m.b.h., Bodenseewerk Geraetetechnik G.m.b.H., BBG Bodenseewerk Geraetetechnik British Aerospace G.m.b.H., Ram-System G.m.b.H., Perkin-Elmer Sciex Instruments, Hitachi Perkin-Elmer, Ltd., Perkin-Elmer Citizen Co., Ltd., Daiichi METCO, Co., Ltd., ULVAC-PHI, Inc., Perkin-Elmer/Cetus Instruments.

3. Petitioner Sea Electronic Aids, Inc. is a subsidiary of a Canadian corporation, Sea Electronics Ltd. Sea Electronics Ltd. and Sea Electronic Aids, Inc. have no subsidiary corporations that are not wholly owned.

4. Petitioner Storage Technology Corporation is a publicly held corporation that is the parent corporation of petitioner Storage

Respondents not named in the caption are Felix Alduen, Rebecca Aponte-Cruz, Claricia Arce-Acevedo,

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Technology de Puerto Rico, Inc. All of the subsidiaries of Storage Technology Corporation and Storage Technology de Puerto Rico, Inc. are wholly owned.

5. Petitioner Westinghouse Electric Corporation is a publicly held corporation that is the parent corporation of Westinghouse de Puerto Rico, Inc. Other than shares owned by directors for qualifying purposes, all of the subsidiaries of Westinghouse Electric Corporation and Westinghouse de Puerto Rico, Inc. are wholly owned, except for the following:

ADEPT Technologies, AEG-Beteiligunsgesellschaft MBH, AEG-Westinghouse Transportation Systems, Inc., Airship Industries, Ltd., CEEC Holdings Incorporated, CEEC Investments Incorporated, Challenger Electrical Equipment Corporation, Computer Aided Training Company, Incorporated, Eletromar Industria Eletrica Brasileira, S.A., Eletromar Nordeste, S.A., Email Westinghouse Pty., Limited, Enwesa Servicios, S.A., Eregli Demir ve Celik Fabrikalori, A.S., Escorts, Ltd., Gamma Metrics, Industria IEM, S.A. de C.V., Infrared Fiber Systems, Inc., Innovative Technologies Incorporated, Inova Microelectronics, Inc., Integrated Communication Systems Inc., Integrated Power Corporation, Jerry Thompson & Associates, Inc., Mecanica Pesada, S.A., Mex Control S.A. de C.V., Micros Systems Inc., Mitsubishi Nuclear Fuel Co., Ltd., Powerex, Inc., Project Funding Corporation, Serratosa & Castells, S.A., Siam Toracato de Tella, Ltd., Silectra S.A. de C.V., Speech Plus, Texas PFC, Inc., Theta J Corporation, Turbine Metal Technologies, Inc., United Western Technologies Corp., Vektron S.A., W. S. Industries (India) Ltd., Westinghouse-Airship Industries, Inc., Westinghouse de Argentina, S.A., New Trends Corporation, Porta Pack Corporation, Group W Radio, Inc., Metropolitan Broadcasting Corporation, Country American Corporation, Castle Rock Entertainment, Horizon International Television, Inc., Sutro Towers, Inc., Television Tower, Inc., Metron, Inc., Harbinger EDI Services, Inc., Industrias Electrónica, S.A. (INDELEC), Westinghouse Electro Metalúrgicas, C.A. (WEMCA), Westinghouse do Brasil, S.A. (WEBSA), Westinghouse Electric Australia Holdings Limited, Email Westinghouse Private, Ltd., Email Westinghouse Properties, Contadores Eléctricos, C.A. (CONTELCA), Elektrik Techizati Imalti Tesisati, A.S., Horiba Westinghouse, Ltd., Hyosung Heavy Industries, Ltd., Industria Eléctrica de México, S.A., Industria et Technologie de la Machine Intelligentie (ITMI), ISCOSA Industries and Maintenance, Ltd., Maihak A.G., Reftrans, S.A., Societe Generale de Travaux Electri-

Milagros Barbosa-Ruiz (for herself and the marital community of herself and Fermin Rosado), Nereida Cancel-Santana, Molania Casiano-Gonzalez, Virgen Casiano-Irizarry, Wilfredo Colon-Marrero, Nilsa Colon-Rivera (for herself and the marital community of herself and Pedro Padilla), Pascual Crodero-Rodriguez, Monserrate Cruz-Chaullissant, Anastacio Custodio-Dennis, Edwin Custodio-Roche, Paula Providencia Diaz-Vazquez, Alicia Duran, Santos Feliciano-Rivera (for herself and the marital community of herself and Juan Rodriguez Rivera), Wanda Flores-Roman, Teresa Figueroa-Vega, Providencia Fortuna-Rodriguez, Iris Garcia-Rodriguez (for herself and the marital community of herself and Idelfonso Velez), Raul Garcia-Rodriguez, Nery Gomez-Almeida, Maria Antonia Guzman-Rodriguez, Juanita Irizarry-Bonilla, Yolanda Irizarry-Gonzalez, Alma Irizarry-Candelaria (for herself and the marital community of herself and Calixto Carrera), Adela Irizarry-Cordero, Rosa Irizarry-Garcia, Domingo Irizarry-Ramirez, Raul Irizarry-Vazquez, Lucia Justiniano-Valle (for herself and the marital community of herself and Damian Valentin), Carmen M. Lebron-Lopez, Ramonita Lopez-Diaz, Georgina Lopez-Vega (for herself and the marital community of herself and Angel Lopez), Efrain Marrero-Velazquez, Cielo Martin-Zayas (for herself and

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ques (SGTE), ETIC BV Rotterdam, Westinghouse Asia Controls Corporation (WEASIA), Cemac Westinghouse Pty. Ltd., Westinghouse Electric Supply Company of Saudi Arabia (WESCOSA), Westinghouse Plasma Systems International, N.V., Westinghouse Saudi Arabia Ltd. (WSAL), Westinghouse Industria Electrica Brasileira S.A., Westinghouse Motor Company, Airspace Management Systems, BITG Corporation, Industria Eléctrica de México, S.A., and WEXICO Systems and Services, Ltd.

6. Petitioners Puerto Rico Aqueduct and Sewer Authority and Puerto Rico Industrial Development Company are public authorities of the Commonwealth of Puerto Rico.

For the purposes of this listing qualifying shares of directors have not been taken into account in determining whether a subsidiary corporation is wholly owned.

the marital community of herself and Jorge Fernandez), Alexis Martinez-Mercado, Magdalena Medina-Ramos, Eneida Melendez-Marrero, Carmen Mercado-Lugo, Nilda Morales, Delfina Morales-Vargas, Natividad Nadal-Santana, Carlos Javier Nazario-Lopez, Luis Angel Nazario-Lopez, Rosa Negron-Figueroa, Pedro J. Oliveras-Ramos, Jr., Angel Ramon Ortiz-Diaz, Maria F. Ortiz-Troche, Luz Maria Otero-Cruz, Carmen L. Pares (for herself and her daughter Jessica Collazo Pares), Gloria Perez-Rodriguez, Milagros Quinones-Lugo (for herself and the marital community of herself and Carlos Juan Galleti Santiago), Liduvina Ramirez, Ernestina Ramirez-Belmont, Maria Ramirez-Rivera, Consuelo Ramos (for herself and the marital community of herself and Pedro Oliveras Velez), Jorge Ramos-Rivera, Petra Rivera-Castillo, Pedro Rivera-Ramos, Zoila A. Rivera-Santiago, Consuelo Robles, Blanca Rodriguez-Lugo, Carlos Rodriguez Silva, Ana Emilia Rodriguez-Velez, Ana J. Rojas-Alicea (for herself and the marital community of herself and Moises Acevedo Pagan), Luz C. Rosado Serrano (for herself and the marital community of herself and German Prieto Camacho), Eneida Ruiz-Segarra (for herself and the marital community of herself and Antinio Nieves Irrizarry), Myrna J. Sanabria-Garcia (for herself and the marital community of herself and Wilson Ayche Valentin), Carmen N. Sanchez-Vega, Arturo Soto-Barbosa, Juanita Soto-Rivera (for herself and the marital community of herself and Santiago Edir Rosas-Muniz), Lillian M. Torres-Echevarria, Georgina Valentin-Molina (for herself and the marital community of herself and Israel Gonzalez), Angel Vazquez-Ayala, Nadia Ivette Velazquez, Providencia Velazquez-Martinez, Maria T. Velez-Carbo (for herself and the marital community of herself and Abdon Fernandez Ithier), Maria T. Velez-Troche, Gloria Vientos-Sanchez, Ana Julia Zaragoza (for herself and the marital community of herself and Ezel Zaragoza), and all others similarly situated.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Puerto Rico Aqueduct and Sewer Authority, Bristol Myers Company, Bristol Caribbean, Inc., Bristol Laboratories Corporation, The Perkin-Elmer Corporation, Perkin-Elmer Caribbean Corporation, Puerto Rico Industrial Development Company, Sea Electronic Aids, Inc., Storage Technology Corporation, Storage Technology de Puerto Rico, Inc., Westinghouse de Puerto Rico, Inc. and Westinghouse Electric Corporation petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-19a) is reported at 888 F.2d 180. The opinion of the district court (App. C, *infra*, 21a-43a) is reported at 693 F. Supp. 1324.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1989 (App. B, *infra*, 20a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are 42 U.S.C. §§ 6903(5), 6903(27), 6972(a)(1)(B) and 6905(a). Those provisions are set forth in relevant part in Appendix D, *infra*, 44a-47a.

STATEMENT

This case raises the question of the meaning of the words "domestic sewage" in the domestic sewage exclusion to the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.* ("RCRA"). RCRA itself does not define this term. The district court held that "domestic sewage" means sanitary waste. The court of appeals reversed, ruling that "domestic sewage" refers to sewage discharged from private households. RCRA's applicability to petitioners' activities turns on the construction of these two words.

RCRA generally regulates the disposal of solid waste and hazardous waste by industrial plants and other commercial enterprises. Section 7002(a)(1)(B) of RCRA, 42 U.S.C. § 6972(a)(1)(B), authorizes citizen suits against—and only against—persons who generate, transport, treat, store or dispose of "solid or hazardous waste." However, RCRA defines "solid waste" to mean

> any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, *but does not include solid or dissolved material in domestic sewage*, or solid or dissolved

> materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923).

42 U.S.C. § 6903(27) (emphasis added). By definition "hazardous waste" is a subset of "solid waste" under RCRA § 1004(5), 42 U.S.C. § 6903(5), so RCRA applies to "hazardous" materials only if they fall within the definition of "solid waste."[1] Thus, if a waste stream consists of "solid or dissolved material in domestic sewage," that waste is not "solid waste" or "hazardous waste" and RCRA does not regulate it.

Petitioners are two public authorities, the Puerto Rico Aqueduct and Sewer Authority ("PRASA") and the Puerto Rico Industrial Development Company, and ten companies that own or operate factories within or adjoining the Guanajibo Industrial Park near Mayaguez, Puerto Rico (the "Park"). Privately-owned sewer connections link these factories to a major publicly owned sanitary sewer line that, in turn, runs to a publicly owned treatment works (the "POTW") operated by PRASA (App. A, *infra*, 4a). At the time the original complaint was filed, these sewer lines and the POTW contained only wastes from the Park, and waste from the

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[1] RCRA § 1004(5), 42 U.S.C. § 6903(5) provides that:

> The term "hazardous waste" means *a solid waste, or combination of solid wastes*, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—
>
> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness, or
>
> (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

(Emphasis added).

Park did not mix with waste from private houses (*ibid.*).[2]

Petitioners' factories—like countless other industrial facilities across the United States—dispose some part of their wastes into the local sanitary sewer system, in this case the Park's sewer system.[3] Before being discharged to the sewers, those wastes must meet the pretreatment standards of the Clean Water Act, 33 U.S.C. § 1317. The sanitary sewers carry this waste to the Park's POTW, which is required to treat the wastes until they are in compliance with the effluent limitations of the POTW's discharge permit. In addition to purely industrial waste, the factories' waste stream contains sanitary wastes from the restrooms, cafeterias, showers, clinics and other facilities used by more than 3,000 employees in the Park.[4]

Respondents, a group of individuals and a community organization, filed their Amended Complaint on March 7, 1988 against 24 defendants. Respondents alleged that petitioners had violated the basic regulatory provisions of RCRA by discharging various hazardous wastes through the Park's sanitary sewer system without keeping proper records or obtaining necessary permits (App. A, *infra*, 4a-5a). Respondents claimed that the Park's sewer lines were leaking, releasing hazardous waste fumes within and around the Park (*id.*, 5a). Arguing that these re-

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[2] In December 1987, after the original complaint was filed, the Park's POTW was closed and waste water from the Park was carried to a regional POTW operated by PRASA in which industrial waste and residential sewage are mixed (App. A, *infra*, 16a-17a). However, respondents' Amended Complaint predicates its RCRA claims upon petitioners' discharge of wastes to the original POTW.

[3] Other wastes are captured at the factories by filters, drain tanks, sumps or other pretreatment devices and sent to licensed disposal or other appropriate facilities. Those wastes are not in question here.

[4] The Park also contains a second, storm sewer system for collecting rainwater and discharging it into a nearby river (App. A, *infra*, 4a). The discharges at issue here, however, all were made to the Park's sanitary sewer system, and not to the storm sewers.

leases posed an "imminent and substantial endangerment" to health and the environment, respondents sought an injunction against petitioners under RCRA's citizen suit provision, § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) (*ibid.*).[5]

A. The district court dismissed respondents' RCRA claims on the grounds that the factories' sanitary wastes were "domestic sewage" and, therefore, that RCRA's domestic sewage exclusion exempted petitioners' discharges from the statute's definition of "solid waste." The district court concluded that the domestic sewage exclusion ("DSE") applied for several reasons. First, finding that "domestic sewage" was not defined in RCRA itself, the court looked to the Environmental Protection Agency's RCRA regulations, which define "domestic sewage" as " 'untreated sanitary wastes that pass through a sewer system' " (App. C, *infra*, 26a).[6] The court re-

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[5] Respondents alleged as well that certain of the defendants had violated the Clean Air Act and the Clean Water Act. However, respondents have settled their Clean Air Act and Clean Water Act claims against all petitioners except one.

Respondents also brought individual and class pendent claims against petitioners under the laws of the Commonwealth of Puerto Rico for nuisance, negligence, trespass and strict liability (App. C, *infra*, 38a). At the time this action was brought, those pendent claims already were the subject of a separate action in the Commonwealth courts in Mayaguez. The district court declined to exercise jurisdiction over respondents' pendent claims and dismissed them (*ibid.*).

[6] EPA's regulation, 40 C.F.R. § 261.4, provides:

> (a) *Materials which are not solid wastes.* The following materials are not solid wastes for the purpose of this part:
>
> (1)(i) Domestic sewage; and
>
> (ii) Any mixture of domestic sewage and other wastes that passes through a sewer system to a publicly-owned treatment works for treatment. *"Domestic sewage" means untreated sanitary wastes that pass through a sewer system.*

(Emphasis added). This regulation sometimes is called the "regulatory" DSE because it exempts hazardous industrial waste mixed

jected respondents' argument that the Park's wastes did not pass "through" a sewer system because they allegedly leaked or evaporated into the environment before reaching the POTW. Instead, the district court reasoned that the DSE on its face excluded material "in" domestic sewage and observed that EPA's request for comments on its RCRA regulations stated that waste fell within the DSE " 'when it first enters a sewer system' " (App. C, *infra*, 27a-28a).[7]

Second, the district court rejected respondents' arguments that this construction of the DSE would defeat RCRA's remedial purposes. It found instead that the Clean Water Act, not RCRA, was the principal statute controlling discharges of pollutants into POTWs and sewer systems, and that the Clean Water Act's pretreatment standards could be used to control petitioners' discharges into the sewers (App. C, *infra*, 29a).[8]

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with domestic sewage from the recordkeeping and regulatory requirements of Subtitle C of RCRA.

[7] The preamble to the proposed regulation stated:

> EPA has, therefore, decided that a waste falls within the domestic sewage exemption when it first enters a sewer system that will mix it with sanitary wastes prior to storage or treatment by a POTW.

45 Fed. Reg. 33084, 33097 (May 19, 1980).

[8] The district court also rejected two technical arguments respondents raised. First, respondents argued that the DSE applied only when the wastes entered *publicly* owned sewer lines because the definition of a POTW included the sewers and pipes leading to the POTW and required that those facilities be owned by a city, town or other public body. The court disagreed, reasoning that, since EPA's regulatory definition of the DSE (*see* pp. 5-6 n. 6, *supra*) implicated the DSE whenever wastes passed through a "sewer system" to a POTW, a "sewer system" was therefore a different, separate entity from a POTW (App. C, *infra*, 30a-31a).

Second, the district court rejected respondents' argument that an internal unpublished EPA guidance document changed the result. EPA's guidance document indicated that industrial wastes must mix in a municipal sewer system with untreated sanitary wastes from

Third, the district court found that application of the DSE was consistent with congressional intent. The court observed that Congress specifically required reevaluation of the DSE in the 1984 RCRA amendments by directing EPA to prepare a study (App. C, *infra*, 32a-33a). That study, released in February 1986, identified the leakage and evaporation of wastes from sewers as potential problems and recommended further study; in August 1986, EPA issued an Advance Notice of Proposed Rulemaking with respect to implementing the study's recommendations and in June 1987 EPA had responded to comments (*id.*, 33a). Thus, "[b]oth Congress and the EPA are aware of possible problems from leakage and evaporation, and Congress' preferred course of action is to study the magnitude of the problems as well as the feasibility of alternatives before legislating changes in the DSE. These problems are not unforeseen aberrations that demand a broad reading of RCRA for the sake of the public welfare" (*id.*, 33a-34a).

Finally, the district court concluded that respondents' position would produce anomalous results. First, respondents' reading of the DSE would result in duplicative and inconsistent regulation under both RCRA and the Clean Water Act by requiring each petitioner to consider its discharges as both hazardous wastes under RCRA and pollutants under the Clean Water Act. Second, it would impose on industrial plants the unworkable burden of monitoring the efficiency of a sewer system they did not operate and, if the sewer failed, subject a factory to the double regulation under RCRA and the Clean Water Act through events beyond their control. Among other things, respondents' position could impose enormous administrative burdens on plants and factories by requiring them to complete a manifest every time

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non-industrial sources before the DSE should apply. The court concluded, though, that RCRA and the EPA's regulations did not support this result (App. C, *infra*, 31a-32a).

chemicals were discharged into the sewer, to identify malfunctioning sewer pipes as containers, and so on (App. C, *infra*, 35a-37a).

B. The First Circuit reversed, holding that the word "domestic" in RCRA section 1004(27) meant "houses" or "residences."[9] The court of appeals listed five reasons for its conclusion. First, the court observed that dictionaries define the word "domestic" to refer to households and private residences (App. A, *infra*, 10a). Second, RCRA section 1004(27) defined " 'solid waste' not simply in terms of the *type* of material, but also in terms of *source*" (*ibid.*) (emphasis in original). Noting that the section refers to wastes " 'resulting from industrial, commercial, mining, . . . agricultural . . . and . . . community' " operations and activities, the court interpreted the term "domestic" to refer to the "*source*" of the waste (*ibid.*) (emphasis in original). "Indeed, one suspects the statute's drafters would have used other words, such as the EPA's term 'sanitary wastes,' had they had only type, not source, in mind" (*ibid.*).

Third, the court of appeals concluded that petitioners' interpretation of the DSE would make it difficult for

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[9] As a threshold matter, the court of appeals determined that Federal Rule of Civil Procedure 54(b) permitted the appeal. Although the case involved multiple parties and multiple claims, the district court's dismissal of the RCRA claims ended the litigation on the merits on at least one of plaintiffs' claims and for at least six of the defendants (App. A, *infra*, 8a). The dismissed RCRA claims, moreover, did not simply duplicate plaintiffs' surviving Clean Air Act and Clean Water Act claims, since the RCRA claims rested primarily upon the emission of noxious fumes from allegedly leaking sanitary sewer pipes, while the Clean Water Act claims rested primarily upon discharges to the Park's storm sewer system and the Clean Air Act claims rested on emissions from chimneys and flues (*ibid.*). Finally, the court of appeals observed that many of the remaining defendants had settled the Clean Water Act and Clean Air Act claims against them and that there was only a small overlap between the remaining air and water claims and the RCRA claims. Thus, the court reasoned it was unlikely adjudication of the air and water claims would moot the appeal (*id.*, 8a-9a).

Congress to achieve its purpose in writing the injunctive RCRA provision. The court observed that most factories and industries have toilets for workers and mix industrial and sanitary waste in pipes below the building, "yet it is difficult to believe Congress would wish to exempt potentially large amounts of industrial waste from the statute's scope simply because they mix with some small amount of bathroom sewage" (App. A, *infra*, 10a-11a).

Fourth, the court of appeals found that the legislative history of RCRA section 7003 suggested that RCRA's injunctive provisions should have a broad scope. The court reasoned that it "would seem somewhat anomalous to interpret the *exception* broadly and thus significantly *narrow* the statute's reach" (App. A, *infra*, 11a) (emphasis in original).

Finally, "and most importantly" (App. A, *infra*, 11a), the court of appeals relied upon the position taken by the EPA in its *amicus curiae* brief.[10] The EPA argued, and the court of appeals did not question, that EPA's regulatory definition of the domestic sewage exemption—which defined "domestic sewage" as "untreated sanitary wastes that pass through a sewer system," *see* pp. 5-6 n.6, *infra*—was inapposite to any construction of the DSE because the regulation implemented RCRA's Subtitle C;[11] thus, actions under RCRA sections 7002 and

[10] The EPA had not participated as *amicus* in proceedings before the district court, nor independently brought suit under RCRA § 7003, 42 U.S.C. § 6973, against petitioners for the alleged RCRA violations, nor exercised its statutory right to intervene in this action under RCRA § 7002(d), 42 U.S.C. § 6972(d). In fact, EPA had previously undertaken an investigation of the alleged leakage and evaporation of hazardous wastes at the Park in 1985 and apparently concluded that there was no imminent and substantial endangerment to the health or environment there. *See* EPA, *Apparent Air Incidents at the Barrio Guanajibo Industrial Park, Mayaguez, Puerto Rico*, Ann Tischbein, Region II Technical Assistance Team (1985).

[11] RCRA sections 3001-3020, 42 U.S.C. §§ 6921-31, 6933-39a, 6979a.

7003 (which are not within Subtitle C) were unaffected by it. Brief For The United States As Amicus Curiae at 13-15 ("EPA Brief").[12]

Second, the EPA argued that the domestic sewage exclusion did not apply to the facts of this case. The EPA contended the exclusion required that industrial waste "must be *in* sewage, not just associated with a minuscule amount of sanitary waste" and the sanitary waste "must be from a source other than an industrial or commercial facility" for the DSE to apply. EPA Brief at 18 (emphasis in original). The EPA claimed that this, in fact, was what its regulatory definition of the DSE was supposed to mean. In support, EPA cited an unpublished, internal EPA guidance document from July 1987 which, "albeit not an EPA regulation," EPA argued was owed "great deference" because it represented EPA's interpretation of its implementing regulations.[13] EPA Brief at 20-21.[14]

The court of appeals relied on EPA's brief—most of which was devoted to arguments concerning EPA's

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[12] For the reference of the Court, a copy of the EPA's *amicus curiae* brief has been lodged with the Clerk.

[13] EPA's unpublished guidance document (which was promulgated for internal use by EPA's Regional Offices in implementing corrective action requirements at POTWs) states:

> Industrial waste which mixes with sanitary waste from on-site sanitary facilities for the employees does not necessarily fall under the domestic sewage exemption, [*sic*] the industrial waste must also mix in the municipal sewer system with untreated sanitary wastes from non-industrial sources.

EPA, *Guidance for Implementing RCRA Permit-by-Rule Requirements at POTWs* 6 (July 21, 1987) (appended in part to EPA Brief).

[14] EPA's brief acknowledged that "dual regulation of the same waste-related activity under RCRA and the Clean Water Act was not intended by Congress." EPA Brief at 23. Without citing any authority, however, EPA argued that narrowing the DSE to exclude mixed waste streams would not result in duplicative regulation. *Ibid.*

regulatory definition of the DSE—as an official agency interpretation of RCRA. The court found that RCRA delegated EPA "considerable authority" to interpret language like "domestic sewage" and to mesh the operation of different environmental protection statutes (App. A, *infra*, 11a-12a). Accordingly, the court of appeals accorded "'considerable weight'" to EPA's construction (*id.*, at 13a). The court held that "once we give that 'weight' to the agency's narrow construction of the exception, the other considerations mentioned earlier are more than sufficient to convince us to follow that construction" (*ibid.*).

The court of appeals found no anomaly in allowing EPA to impose two inconsistent definitions of a single term within the same statute.[15] Citing no authority from the language, legislative history or case law of RCRA, the court stated that the reason for its deference was its "belief that Congress, in effect, *delegated* to the agency a degree of interpretive power," and thus "it does not seem odd to find the agency interpreting the same words somewhat differently as they apply to different parts of the statute in order better to permit that statute to fulfill its basic congressionally determined purposes" (App. A, *infra*, 15a) (emphasis in original). The court of appeals was not troubled that this broad delegation was nowhere found in RCRA. The court reasoned that "[h]ad the statute *expressly* delegated the authority to the EPA to decide the precise scope of the various parts of the statutory definition, *see* 42 U.S.C. § 6903(27), under different parts of the statute, it would not seem at all odd to find the EPA tailoring its scope to fit the needs and objectives of the statute's different parts" (App. A, *infra*, 15a-16a) (emphasis in original). Consequently, "[w]hy

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[15] Instead, the court asked rhetorically, "why, given the general broad language of the entire definitional section, could not EPA define the exception's scope somewhat differently for purposes of different parts of the RCRA statute?" (App. A, *infra*, 15a).

should the EPA not have somewhat similar authority, at least to create minor differences, where the delegation is *implicit . . .?*" (*id.*, 16a) (emphasis in original). The court of appeals remanded the case to the district court for further proceedings consistent with its opinion.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision contains serious errors of environmental and administrative law. The court of appeals misunderstood the nature and demarcation of the carefully-drawn boundary between RCRA and the Clean Water Act. The court of appeals committed an equally serious error in elevating EPA's *amicus curiae* brief to the level of a formal agency regulation or interpretive statement and in giving deference to a statutory interpretation that EPA had never previously offered in a public document.

The court of appeals' decision will have a serious effect on thousands of factories and industrial plants across the United States, as well as the local agencies owing and operating sewer systems, that have relied for years on the domestic sewage exclusion as the regulatory boundary between RCRA and the Clean Water Act. Because the decision below will expose factories and POTWs to injunctive restraints for matters wholly beyond their control, it will require them to take the prophylactic step of regulating themselves under both RCRA and the Clean Water Act. This anomalous result will subject industrial facilities and POTWs alike to the costly and duplicative regulation RCRA expressly enjoins.

I. THE DOMESTIC SEWAGE EXCLUSION IS THE BOUNDARY BETWEEN THE CLEAN WATER ACT AND RCRA

The Clean Water Act. The Clean Water Act is "the basic federal legislation dealing with water pollution." *Chemical Manufacturers Assn. v. Natural Resources De-*

fense Council, Inc., 470 U.S. 116, 118 (1985). The 1972 amendments to the Act established a comprehensive system, the National Pollutant Discharge Elimination System ("NPDES"), to regulate the disposal of polluting effluents to navigable waters, including wastes discharged to sewers and POTWs. The Act requires "point sources," that is, those who are direct dischargers of waste, to obtain an NPDES permit from the Environmental Protection Agency or a qualified state regulator before they can discharge that waste. *See, e.g., International Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987). An NPDES permit contains detailed effluent limitations for the point source and, if applicable, a compliance schedule for attaining these limitations. *See also E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 116-121 (1977).

Clean Water Act section 307, 33 U.S.C. § 1317(b), imposes "pretreatment standards" upon companies who are indirect dischargers of waste, that is, "those whose waste water passes through publicly owned treatment plants." *Chemical Manufacturers Assn. v. Natural Resources Defense Council, Inc., supra*, 470 U.S. at 119. The pretreatment standards address so-called "pass through" pollutants, *i.e.*, pollutants that are not susceptible to treatment by the POTW. The Act requires factories to treat and remove "pass through" pollutants before the factory's waste is discharged to the sewer system serving the POTW "so as to achieve, together with the [POTW] that treated the waste before final discharge into navigable waters, the same level of toxics removal as was required of a direct discharger." *Natural Resources Defense Council, Inc. v. EPA*, 790 F.2d 289, 292 (3rd Cir. 1986), *cert. denied*, 479 U.S. 1084 (1987).

The Resource Conservation And Recovery Act. Congress enacted RCRA in 1976 "to promote the protection of health and the environment and to conserve valuable materials and energy resources" by encouraging the con-

servation and responsible disposal of solid wastes and by imposing comprehensive regulation of the generation, storage, transport and disposal of solid and hazardous wastes. *See* RCRA sections 1002, 1003, 42 U.S.C. §§ 6901, 6902. RCRA restricts the disposal of solid waste, prohibits open dumping of solid waste, encourages solid waste recycling and recovery, and establishes programs of federal assistance to local governments. RCRA also closely regulates hazardous wastes. Those who generate, store, transport, treat or dispose of hazardous wastes are required to notify EPA (or the equivalent state regulator) of their activities, comply with RCRA's "cradle to grave" regulatory system, obtain permits to treat or store hazardous wastes, and submit to EPA or state inspections.

Congress was mindful, however, of the potential for duplicative and burdensome regulation in those areas where RCRA overlapped with other environmental laws. Thus, Congress expressly limited RCRA's scope to avoid that duplication. In RCRA section 1006(a), 42 U.S.C. § 6905(a), Congress exempted from RCRA's scope "any activity or substance" which was subject to the Clean Water Act and certain other environmental laws "except to the extent that such application (or regulation) is not inconsistent with the requirements of such Acts." Similarly, Congress enjoined the Administrator of EPA in RCRA section 1006(b) to "*avoid duplication to the maximum extent practicable*" with the appropriate provisions of the Clean Water Act and other environmental laws in administering RCRA. 42 U.S.C. § 6905(b) (emphasis added).

RCRA's domestic sewage exclusion implements this policy by serving as the statutory demarcation of the boundary between RCRA and the Clean Water Act. The DSE exempts from the definitions of "solid waste" and "hazardous waste"—and thus from RCRA generally—"solid or dissolved material in domestic sewage" because those waste streams are already regulated by the Clean Water

Act's pretreatment and NPDES discharge permit standards. In fact, the domestic sewage exclusion is but one of several such exemptions in section 1004(27). Besides domestic sewage, Congress chose to exclude from RCRA "solid or dissolved materials in irrigation return flows" (already regulated under the Clean Water Act's nonpoint source requirements, § 319, 33 U.S.C. § 1329), "industrial discharges which are point sources" subject to NPDES permits under the Clean Water Act, and "source, special nuclear, or byproduct material" already regulated by the Atomic Energy Act. 42 U.S.C. § 6903(27). *See, e.g., Fishel v. Westinghouse Electric Corp.*, 617 F. Supp. 1531, 1538 (M.D. Pa. 1985) (cleaning industrial equipment over storm drains not a RCRA violation because RCRA's definition of "solid waste" excludes point sources subject to permits under 33 U.S.C. § 1342). RCRA's domestic sewage exclusion, consequently, is one of a series of exclusions that define where RCRA leaves off and other environmental statutes begin and serve RCRA's policies against regulatory duplication. *See* RCRA § 1006, 42 U.S.C. § 6905.

The EPA's regulations have repeatedly observed this fact. As discussed at great length in the opinions below and in the EPA's *amicus curiae* brief itself, EPA promulgated a regulatory definition of the DSE in 1980 that exempted mixtures of sanitary sewage and other wastes passing to a POTW for treatment from the requirements of RCRA's Subtitle C. *See* 40 C.F.R. § 261.4(a)(1)(ii) & pp. 5-6 n. 6, *infra*. Likewise, in five different places in its regulations implementing the carry-over provisions of the 1965 Solid Waste Disposal Act (which EPA enforces under authority of RCRA), EPA excluded from the definition of "solid waste" "solids or dissolved material in domestic sewage or other significant pollutants in water resources, such as silt, dissolved or suspended solids in industrial wastewater effluents, dissolved materials in irrigation return flows or other common water

pollutants." 40 C.F.R. §§ 240.101(y), 241.101(v), 243.101(y), 246.101(b) and 247.101(i). *See also* 40 C.F.R. § 257.2 (EPA's definition of the DSE for purposes of solid waste disposal). Thus—at least until it filed its *amicus curiae* brief below—the EPA itself recognized the boundary-setting function of the DSE and never questioned the placement of this line.

II. THE COURT OF APPEALS ERRED IN DEFINING "DOMESTIC SEWAGE" AS "HOUSEHOLD" OR "RESIDENTIAL" SEWAGE

A. The Language Of RCRA

The court of appeals misconstrued the boundary between RCRA and the Clean Water Act by wrongly interpreting the term "domestic" to mean "household" or "residential" instead of "sanitary" or "human" (App. A, *infra*, 4a, 10a). There is abundant evidence that Congress is capable of using, and does use, the terms "household" or "residence" when it means to. "Household" has been used frequently by Congress and the EPA throughout the environmental laws and regulations to describe private residences. For example, under RCRA section 4005(c), 42 U.S.C. § 6945(c), a solid waste management facility that receives only "*household*" waste is exempt from the permit provisions found in RCRA section 3005, 42 U.S.C. § 6925 (emphasis added). Likewise, RCRA section 3001(i), 42 U.S.C. § 6921(i), directs upon the Administrator to clarify a RCRA exemption for facilities burning only "household waste" that the section refers to as the "Household Waste Exclusion." In fact, the term "household" is used in three other sections of RCRA.[16]

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[16] *See* RCRA § 4010(c), 42 U.S.C. § 6949a(c) (directing the Administrator to promulgate revisions of criteria for facilities that may receive "hazardous household wastes"), § 8002(d), 42 U.S.C. § 6982(d) (directing the Administrator to study, among other things, "household resource recovery and resource recovery systems"), and 42 U.S.C. § 6992g(a)(11)(A) (EPA report to Congress on medical waste will include the "effect of excluding households" from regulations).

six times in other environmental laws,[17] and in countless other statutes. RCRA also uses the term "residence" to refer to a private dwelling. *See* RCRA § 3010 (a)(2), 42 U.S.C. § 6930(a)(2) (excluding an owner of a "single or two-family residence" from preliminary notification requirements). If, as the court of appeals held, Congress intended to exempt only "household" or "residential" waste from RCRA, Congress undoubtedly would have said so.[18]

Notwithstanding its recent *amicus* position before the court of appeals, EPA itself has consistently used the terms "household" or "residence"—and not "domestic"—to describe private homes in its RCRA regulations. Six sections of EPA's RCRA regulations employ the words "household" or "residence" to refer to waste from private homes.[19] In fact, one of these—appearing on the same

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[17] *See* 7 U.S.C. § 136q (Federal Insecticide, Fungicide and Rodenticide Act) (Administrator may exempt from pesticide control products "intended solely for household use"); 7 U.S.C. § 3802(2) (Swine Health Protection Act) (the term "garbage" shall not include "waste from ordinary households"); 15 U.S.C. § 1262(b) (Hazardous Substances Act) (labeling requirements for a hazardous substance intended "for use in household"); 42 U.S.C. §§ 6292(b), 6295(i) (Energy Policy and Conservation Act) (energy conservation standards using "average household energy use", "aggregate household energy use"); 42 U.S.C. §§ 8216(a)(4), 8235a (National Energy Conservation Policy Act) (suggestion for energy conservation techniques include "modifications of household activities"); and 42 U.S.C. § 9601(34) (Comprehensive Environmental Response, Compensation and Liability Act) (term "alternative water supply" includes "household water supplies").

[18] Conversely, although the term "sanitary waste" is used in two sections of the Clean Water Act to refer to human waste (see 33 U.S.C. §§ 1281, 1284), Congress nowhere used that term in RCRA. Congress' decision to use the term "domestic sewage" to refer to waste from bathrooms, cafeterias and other personnel facilities in factories thus created no anomalies within RCRA's statutory terminology.

[19] *See* 40 C.F.R. § 243.101(u) (RCRA subtitle D) (" 'Rubbish' means a general term for solid waste . . . taken from residences"),

page of EPA's regulations as EPA's regulatory definition of "domestic sewage"—defines "household waste." 40 C.F.R. § 261.4(b)(1). Moreover, the sole regulatory definition of the term "domestic sewage" is EPA's regulation defining "domestic sewage" as "untreated sanitary wastes that pass through a sewer system." 40 C.F.R. § 261.4(a)(1)(ii).[20]

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40 C.F.R. § 245.101(j) (RCRA, subtitle D) ("residential solid waste" defined as "the garbage, rubbish, trash, and other solid waste resulting from the normal activities of households"); 40 C.F.R. § 246.101(y) (RCRA, subtitle D) ("residential solid waste" defined as "the wastes generated by the normal activities of households"); 40 C.F.R. § 246.201-5(a) (RCRA, subtitle D) (separated materials may be collected from each "household"); 40 C.F.R. § 261.4(b)(1) (RCRA, subtitle C) (definition of "household waste"); and 40 C.F.R. § 266.41(b)(2)(iii)(A) (RCRA, subtitle E) (heater burning used oil "received from do-it-yourself oil changers who generate used oil as household waste").

Other sections of EPA's regulations also follow this use. *See* 40 C.F.R. § 60.451 (Clean Air Act) ("large appliance product" defined as organic metal coated appliance manufactured "for household" use); 40 C.F.R. § 122.2 (Clean Water Act, NPDES Permit System) ("sewage" defined as "any wastes, including wastes from humans, households . . ."); 40 C.F.R. § 141.32(e)(2) (Clean Water Act) (drinking water standard set for carbon tetrachloride, "once a popular household cleaning fluid"); 40 C.F.R. § 141.34(c)(2) (Clean Water Act) (public notice requirements pertaining to lead in "household water"); 40 C.F.R. §§ 152.3(u), 157.21(e), 163.3(m) (Federal Insecticide, Fungicide and Rodenticide Act) ("residential use" of pesticide defined as application to "area associated with the household"); 40 C.F.R. §§ 355.20, 370.2, 370.40, 370.41, (Superfund Amendment and Reauthorization Act, title III) ("hazardous chemical" does not include any substance "to the extent it is used for personal, family, or household purposes"); 40 C.F.R. § 721.1750(b)(1) (Toxic Substances Control Act) ("consumer product" defined as substance for use "in or around a permanent or temporary household"); and 40 C.F.R. § 761.3 (Toxic Substances Control Act) ("municipal solid waste" includes discarded material from "household activities").

[20] The court of appeals erred in relying on the structure of RCRA section 1004(27) to support its holding. The court read the section to define waste by "source" as well as "type" (App. A,

B. The Court Of Appeals Misconstrued The Policies Underlying RCRA

The court of appeals also erred in concluding that the policies underlying RCRA supported its narrow construction of the domestic sewage exclusion. First, the court of appeals was mistaken in finding that RCRA's injunctive provisions would be defeated if "domestic sewage" were given anything besides a narrow reading. The court hypothesized that, since most factories contain toilets, petitioners' reading of the DSE could "exempt potentially large amounts of industrial waste from the statute's scope simply because they mix with some small amount of bathroom sewage" (App. A, *infra*, 10a-11a). But the court of appeals erred on both practical and legal grounds. As a threshold matter, domestic sewage typically is a substantial portion of all waste produced by a factory. Various state building codes, in fact, estimate that a factory with a cafeteria produces substantial domestic waste flows. *See, e.g.*, Puerto Rico Environmental Quality Board, Regulation for the Certification of Plans & Projects, Pt. II, Table 4-1 (35 gallons per employee per shift); Mass. Regs. Code tit. 314, § 7.15 (20 gallons per

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infra, 10a). As true as this may be, it offers no evidence one way or the other of Congress' intentions, since the section sometimes defines wastes by type and sometimes by source, depending upon the context and materials involved. "Solid waste" is defined in section 1004(27) as

> any garbage [*type*], refuse [*type*], sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility [*type and source*] and other discarded material [*type*], including solid, liquid, semisolid, or contained gaseous material resulting from industrial-commercial, mining, and agricultural operations, and from community activities [*type and source*], but does not include solid or dissolved material in domestic sewage [*type*], or solid or dissolved materials in irrigation return flows [*type and source*] or industrial discharges which are point sources subject to permits under section 1342 of title 33 [*type and source*] or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954 . . . [*type*].

42 U.S.C. § 6903(27).

employee per day). The Guanajibo Industrial Park, in which approximately 3,000 employees work, hardly is one with a negligible domestic waste stream.

The court of appeals equally misunderstood the balancing of the policies underlying RCRA. In stressing the broad scope of RCRA's injunctive provisions (App. A, *infra*, 11a), the court ignored the more fundamental policies against duplicative regulation that appear on RCRA's face. *See* RCRA § 1006, 42 U.S.C. § 6905 (directing the EPA Administrator to "avoid duplication to the maximum extent practicable" between RCRA and other environmental laws). *See also* House Conference Report on the Hazardous and Solid Waste Amendments of 1984, H.R. Rep. No. 98-1133, 98th Cong., 2d Sess. 115, *reprinted in* 1984 U.S. Code Cong. & Admin. News 5649, 5686 (discussing section 246, which directed the EPA to conduct a study of the DSE) ("[t]he Conference substitute is the same as the House bill, with the clarification that EPA may use pretreatment standards under section 307 of the Clean Water Act to control hazardous waste mixed with domestic sewage.").

The court of appeals' emphasis on RCRA's injunctive provisions also ignores the fact that the other environmental statutes that complement RCRA contain injunctive provisions allowing the EPA to bring suit to abate violations such as those alleged here. Under the Clean Water Act, for example, the EPA is authorized to seek injunctive relief where a pollution source presents "an imminent and substantial endangerment to health." 33 U.S.C. § 1364. Similarly, the Comprehensive Environmental Response, Compensation and Liability Act empowers EPA to seek injunctive relief when an actual or threatened release of a hazardous substance "may pose an imminent and substantial endangerment to the public health or the environment." 42 U.S.C. § 9606. The Clean Air Act also gives EPA authority under 42 U.S.C. § 7603 to seek injunctive relief to address pollution from a point source which presents "an imminent and substantial en-

dangerment to the health of persons." Thus, giving the domestic sewage exclusion its clear meaning will not exempt factories from the environmental laws or deprive the EPA of its remedies.[21]

Finally, strong policies suport maintaining the boundary between RCRA and the Clean Water Act where Congress drew it. As explained above, the domestic sewage exclusion places regulation of covered industrial discharges under the Clean Water Act, which in turn distributes compliance burdens between industries and POTWs. Factories are required to comply with the Act's pretreatment standards in the wastes they discharge and

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[21] These provisions, to be sure, confer this power only upon the EPA, and not upon private citizens. But there is no evidence within RCRA or in the legislative history of the 1984 RCRA amendments adding the citizen suit provisions of section 7002 to support—and much to rebut—the proposition that the citizen suit provisions were so central to Congress' purpose that they require all other provisions of RCRA to be read narrowly. In *Hallstrom v. Tillamook County*, 110 S.Ct. 304 (1989), for example, the Court rejected arguments that the policies underlying RCRA citizens suits outweighed section 7002(b)(1)'s requirement that plaintiffs provide 60 days advance notice of suit. "Although we do not underestimate the potential damage to the environment that could ensue during the 60-day waiting period, this problem arises as a result of the balance struck by Congress in developing the citizen suit provisions." 110 S.Ct. at 311. *See also id.*, at 310 (" 'citizen suit is meant to supplement rather than to supplant governmental action.' " (*quoting Gwaltney of Smithfield, Inc. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60 (1987))).

Moreover, the citizen suit provisions of other environmental statutes confer important rights on private citizens to bring suit for a wide range of environmental violations. The Clean Air Act, for example, gives a private right of action against any person who violates an emission standard, limitation or order under the Act, or who proposes to construct a "major emitting facility" without a permit. 42 U.S.C. § 7604. The Clean Water Act permits citizen suits for violation of an effluent standard, limitation or order. 33 U.S.C. § 1365. CERCLA authorizes citizen suits for any violation of a CERCLA standard, regulation, requirement or order. 42 U.S.C. § 9659.

to pay substantial users' fees to the POTWs for final waste treatment. POTWs are required to treat the wastes they receive to comply with the effluent limitations of their permits under the Act.[22]

The court of appeals profoundly disturbed this balance. Under the First Circuit's rule, factories and POTWs are subject to RCRA injunctions even if both are in compliance with all applicable Clean Water Act requirements. Factories discharging waste through a sewer system may be closed under RCRA whenever the sewer system or its POTW fails. Local agencies owning or operating a POTW and sewer system likewise are exposed to a RCRA injunction for whatever the factories discharge into the sewer system. This rule would apply even though a factory is not in a position to direct the operations of a POTW or sewer system and a sewer authority cannot be responsible for the daily operations of a factory.

To avoid the specter of injunctive actions against them for matters they cannot control, both factories and POTWs will be required by the decision below to regulate themselves under RCRA as well as the Clean Water Act. Thus, a factory no longer could limit its wastes to those meeting the Clean Water Act's pretreatment standards, and a POTW could not accept such discharges, if there were any prospect that those discharges could be considered "solid wastes" or "hazardous wastes" under RCRA. The factory and the POTW would be forced to completely remove its "solid" and "hazardous" wastes from discharges to the sewer system, eliminating an important, and congressionally approved, method of waste disposal used in thousands of factories and industrial facilities across the country. This result is precisely the costly and duplicative regulation that Congress feared when it enacted RCRA and the result Congress attempted to

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[22] Respondents have not argued that the factories in the Park have violated Clean Water Act pretreatment standards, nor that the Park's POTW is in violation of its NPDES permit.

forestall in RCRA section 1006's prohibition of duplicative regulation.

C. The Court Of Appeals Ignored Congress' Clear Intent That The Domestic Sewage Exclusion Should Not Be Changed Except After Further Study And As A Result Of Specific Legislation

In its zeal to close what it thought was a loophole in RCRA, the court of appeals overlooked Congress' clear directions that the domestic sewage exclusion should be changed only by specific legislation and, even then, only after further study.[23] In fact, Congress has expressly recognized that the DSE may permit some hazardous wastes to go unregulated under RCRA. In its 1984 amendments to RCRA, Congress enacted a new section to RCRA, 3018, 42 U.S.C. § 6939, specifically addressing the subject of the domestic sewage exclusion. Section 3018(a) required the Administrator to "submit a report in 15 months concerning those [hazardous wastes] which are not regulated under this subtitle by reason of the exclusion for mixtures of domestic sewage and other wastes that pass through a sewer system to a publicly owned treatment works."[24] Section 3018(b) directed the Ad-

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[23] Nor, even if the DSE could be called a loophole, is it a loophole that the court of appeals' decision effectively closes. Under the court of appeals' formulation, RCRA would not apply to these wastes because of what they contain, but rather because of the sewer line to which they are discharged. Thus, factories discharging mixed wastes to a municipal sanitary sewer and POTW would continue to fall under the domestic sewage exclusion—whatever the content of their wastewater—while factories discharging identical wastes to an industrial park's sanitary sewer and POTW would be regulated under RCRA.

[24] Section 3018(a) goes on to state:

> Such report shall include the types, size and number of generators which dispose of such substances in this manner, the types and quantities disposed of in this manner, and the identification of significant generators, wastes, and waste constituents not regulated under existing Federal law or regulated

ministrator to revise existing regulations and promulgate additional ones under RCRA or the Clean Water Act "necessary to assure that [hazardous wastes] which pass through a sewer system to a publicly owned treatment works are adequately controlled to protect human health and the environment." Finally, section 3018(d) extended two important areas of RCRA regulation to hazardous wastes otherwise protected by the DSE. First, it required generators, transporters or disposers of otherwise excluded hazardous waste to comply with RCRA section 3010(a), 42 U.S.C. § 6930(a), by filing a notification with the Administrator identifying and describing their activities. Second, section 3018(d) subjected persons who generated, stored, treated, transported, disposed or handled otherwise excluded hazardous wastes subject to inspections by the EPA or state regulators under RCRA section 3007, 42 U.S.C. § 6927. Thus, Congress' 1984 RCRA amendments confirm that Congress chose to study and review any possible shortcomings in the DSE before acting on them, and did not see the DSE as a loophole for the courts to close.

The court of appeals' decision is all the more startling in view of the fact that EPA's Domestic Sewage Study, which resulted from the 1984 RCRA amendments, recommended that the DSE be *retained*, not repealed. EPA's study concluded that "[t]he DSE provides continuity between the regulatory controls imposed by RCRA and the CWA. RCRA rules do not apply to hazardous wastes upon 'first entry' to the sewer system. Once hazardous waste enters the sewer system, CWA's pretreatment program becomes the sole applicable control program." EPA, Report to Congress on the Discharge of Hazardous Wastes to Publicly Owned Treatment Works, 7-8 (Feb. 1986). The Report went on to state:

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in a manner sufficient to protect human health and the environment.

42 U.S.C. § 6939(a).

> The proximity of municipal control authorities to discharging industries, along with the wide range of compliance tools available in Federally approved local programs [citations omitted], affords a unique opportunity for direct, site-specific control of hazardous discharges. Conceptually, this seems to be a very logical way of ensuring effective treatment of hazardous wastes.

Id., at 6-82. The EPA concluded that controls of hazardous waste discharges should be addressed by improving pretreatment standards and programs under the Clean Water Act and other environmental statutes. *Id.*, E-6, 7-10 to 7-12.[25]

III. THE COURT OF APPEALS ERRED IN TREATING THE EPA'S AMICUS CURIAE BRIEF AS AN INTERPRETIVE REGULATION OF THE DOMESTIC SEWAGE EXCLUSION

A. The Court Of Appeals Erred In Giving Deference To EPA's Construction Of RCRA That Was Found Nowhere Other Than EPA's Amicus Curiae Brief

Finally, and "most importantly" for purposes of its analysis, the court of appeals deferred to the EPA's construction of the statutory domestic sewage exclusion (App. A, *infra*, 11a-13a). But that construction was not one found in EPA's regulations, interpretive rules or policy statements, because none exist and none were cited

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[25] Section 3018(b) of the 1984 RCRA amendments directed EPA to revise existing regulations to assure that hazardous wastes that pass through a sewer system to a POTW are "adequately controlled to protect human health and the environment." In its proposed rule, EPA specifically considered the environmental dangers plaintiffs allege here from "toxic gas and vapors" released from the sewer system. 53 Fed. Reg. 47632, 47635 (Nov. 23, 1988). Although EPA was given broad latitude by RCRA § 3018(b) to remedy this and any other problem it found, EPA decided to address this concern by amending the pretreatment requirements of the Clean Water Act. *Id.* The proposed rule did not discuss § 7003, or any other section of RCRA, as the appropriate solution.

anywhere in the court's decision. Instead, the court of appeals deferred to the construction of the statutory DSE found in no public EPA pronouncement except EPA's *amicus curiae* brief.[26] Notably missing in the court of appeals' analysis was any citation—of any sort—to a regulation, rule, policy statement, speech or even newspaper article enunciating any such construction of RCRA's statutory domestic sewage exclusion by the EPA. Instead, the "weight" the court ascribed to the EPA's interpretation was based entirely on the conclusory arguments that the EPA had made in fewer than three pages of text in its brief. *See* EPA Brief at 17-19.[27]

It is axiomatic that, before an agency's construction of a statute can receive deference from a court, the agency must offer an interpretation that is the product of agency action to begin with. The EPA's *amicus curiae* brief clearly does not fall within that scope of agency actions

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[26] The court of appeals repeatedly stressed the weight it ascribed to the EPA's position. For example, the court wrote that RCRA delegated EPA "considerable authority . . . to interpret language like 'domestic sewage' and thereby fix, at the boundaries, the precise scope of the exception" (App. A, *infra*, 11a). Later, the court observed (*id.*, 12a) that "the language in question constitutes a small part of a comprehensive regulatory scheme that Congress entrusted the EPA to administer, sensibly and in conjunction with other, related environmental regulatory schemes designed to secure clean water, clean air, and a safe environment." The court of appeals also wrote (*ibid.*) that "[t]he agency either has, or will develop, the type of experience that will permit it properly to mesh these related statutes, both to avoid senseless or overly harsh results, and better to fulfill their overall environmental objectives." "And, that being so, a court can appropriately infer an 'implicit' congressional delegation of interpretitive authority to an agency" (*id.*, 12a-13a). The court of appeals then proceeded (*id.*, 13a) to conclude "once we give that 'weight' to the agency's narrow construction of the exception, the other considerations mentioned earlier are more than sufficient to convince us to follow that construction."

[27] The balance of the *amicus* brief dealt with EPA's arguments concerning the meaning of EPA's regulatory definition of "domestic sewage" in 40 C.F.R. § 261.4.

or documents to which deference is due. EPA's brief, and the construction it offers, was not subject to notice and comment under the Administrative Procedure Act, 5 U.S.C. § 553, never appeared in the *Federal Register* or EPA's regulations, was not the product of any agency adjudicatory proceeding or licensing decision, and did not result from a published opinion of agency staff.

An agency position that is advocacy and nothing more is not entitled to deference from courts in their construction of a statute. In *Bowen v. Georgetown University Hospital*, 109 S. Ct. 468, 473 (1988), the Court refused to defer to the Department of Health and Human Services' interpretation of the Medicare Act where the Department could point to no authority for its construction other than its brief.

> [T]he Secretary [of HHS] contends that it is entitled to deference under *Young v. Community Nutrition Institution*, . . . *Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.*, . . . and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* . . . . We have never applied the principle of those cases to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice. To the contrary, we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that 'Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.'

(Citations omitted). The Court concluded that "[d]eference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." 109 S.Ct. at 474.

Likewise, in *Investment Company Institute v. Camp*, 401 U.S. 617, 626-28 (1971), the Court refused to defer to a construction of the Glass-Steagall Act that the Comptroller of the Currency offered for the first time on

appeal. The Court found that deference was not appropriate because the Comptroller had adopted "no expressly articulated position at the administrative level" as to the meaning and impact of the statutes.

> To be sure, counsel for the Comptroller in the course of this litigation and specifically in his briefs and oral argument in this Court, has rationalized the basis of Regulation 9 with great professional competence. But this is hardly tantamount to an administrative interpretation of §§ 16 and 21.

401 U.S. at 627-28.

The authority relied upon by the court of appeals does not support the deference it gave to the EPA's *amicus* position. In *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980), the Court deferred to the Federal Reserve Board's construction of the Truth In Lending Act. The Board's interpretations were in the form of written staff interpretations, upon which Congress had conferred special status. *See id.*, 444 U.S. at 566 & n.9. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), the Court gave "considerable weight" to EPA's construction of section 172(b)(6) of the Clean Air Act, 42 U.S.C. § 7502(b)(6). However, the EPA's interpretation of the section was found in a regulation, 40 C.F.R. § 51.18(j)(1), that the EPA had formally adopted. In this case, by contrast, the positions of the EPA's *amicus* brief to which the court of appeals gave "considerable weight" (App. A, *infra*, 13a) were not the product of agency rulemaking, nowhere appeared in EPA's public documents and cannot be said to result from the agency's administrative practice.

B. The Court Of Appeals Erred In Deferring To An Agency Interpretation That Was Inconsistent With EPA's Administrative Practice And Published Regulations

The court of appeals' deference to the construction offered in EPA's *amicus* brief was all the more inappropriate because that construction was clearly inconsistent with the EPA's regulations and administrative practice.

EPA's regulatory definition of "domestic sewage," promulgated in 1980, unequivocally defined "domestic sewage" to mean "untreated sanitary wastes that pass through a sewer system." 40 C.F.R. § 261.4(a)(1)(ii). In its Domestic Sewage Study, EPA referred to this regulation as synonymous with the statutory DSE itself. *See* Domestic Sewage Study 7-8 to 7-9 & p. 24, *supra*. Yet not until the filing of EPA's *amicus* brief did EPA announce to anyone outside the agency, nor was it widely understood, that the EPA's construction of the statutory exclusion was significantly narrower than its published regulation.

In these circumstances, it was error to give "considerable weight" (App. A, *infra*, 13a), to an EPA interpretation that was at odds with its published regulation and inconsistent with its past position. *See, e.g., Bowen v. Georgetown University Hospital, supra*, 109 S. Ct. at 474 (Court refuses to give deference to agency position that is at odds with its past administrative practice); *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981); *Board of Governors of Federal Reserve System v. First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978) (Court defers to agency's longstanding interpretation of statutory mandate where Congress has not altered the administrative interpretation); *Batterton v. Francis*, 432 U.S. 416, 425 n. 9 (1977) ("Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise."). EPA's regulations and consistent administrative practice have construed RCRA's domestic sewage exclusion to exempt mixed waste streams such as that in question here, and the court of appeals erred in giving deference to a construction that flew in the face of the agency's longstanding interpretation.[28]

[28] Although the EPA claimed in its *amicus* brief that its regulation was confined in scope to Subtitle C of RCRA (EPA Brief at 13-15), that position, too, was a novel one that EPA had not publicly taken before. Thus, it was owed no more deference than any of EPA's other constructions.

The court of appeals erred in treating the EPA's *amicus curiae* brief as an official agency interpretation when, in fact, it was nothing more than advocacy of a newly-announced enforcement position. Indeed, the court of appeals' deference to the EPA's *amicus* position and readiness to ignore EPA's published regulatory definition create a strange anomaly of administrative law and statutory construction: where there is no public document supporting an agency's construction of a statute, the agency's views nevertheless will be given "considerable weight" if it goes to the trouble of filing an *amicus curiae* brief; yet longstanding published regulations will be freely ignored if they conflict with the position the *amicus* brief advances. The court of appeals has created a rule that permits an agency to command deference at its whim.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JANUARY 24, 1990

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 89-1091

COMITE PRO RESCATE DE LA SALUD, ETC., *et al.*,
Plaintiffs, Appellants,

v.

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY, ETC., *et al.*,
Defendants, Appellees.

Appeal from the United States District Court
for the District of Puerto Rico

[Hon. Jaime Pieras, Jr., *U.S. District Judge*]

Before
Breyer and Selya, *Circuit Judges*,
and Caffrey,* *Senior District Judge.*

Anthony Z. Roisman with whom *Ann C. Yahner*, *Cohen, Milstein & Hausfeld*, *Michael E. Withey*, *Leonard W. Schroeter*, *Schroeter, Goldmark & Bender* and *Pedro J. Varela* were on brief for appellants.

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* Of the District of Massachusetts, sitting by designation.

Donald A. Carr, Acting Asssistant Attorney General, *Randolph L. Hill*, Office of General Counsel, Environmental Protection Agency, *Susan B. Squires* and *Anne S. Almy*, Land & Natural Resources Division, Department of Justice, on brief for the United States, Amicus Curiae.

Robert E. Zahler with whom *Michael L. Stern*, *Margaret B. Bowman*, *Shaw, Pittman, Potts & Trowbridge*, *Francisco G. Bruno*, *Sweeting, Gonzalez & Cestero*, *Geoffrey Stewart*, *Hale & Dorr*, *Pedro A. Morell*, *Brown, Newsom & Cordova*, *Dwight C. Seeley*, *Edward J. Burns*, *John L. Greenthal*, *Nixon, Hargrave, Devans & Doyle*, *Jose A. Cestero*, *Andreu Garcia Law Offices*, *Zaidee Acevedo*, *Steven C. Lausell*, *Jiminez, Graffam & Lausell*, *Enrique Alcaraz Micheli*, *Ferrer & Alcaraz*, *Laurie S. Gill*, *Palmer & Dodge*, *Encarnita Catalan Marchan*, *Santiago Mari Roca* and *Ribas, Biaggi & Mari*, *Irwin H. Flashman*, *Zadetic Bajandas* and *O'Neill & Borges* were on brief for appellees The Perkin-Elmer Corporation and Perkin Elmer Caribbean Corporation, Storage Technology Corporation and Storage Technology de Puerto Rico, Puerto Rico Industrial Development Company, Bristol Myers Company, Bristol Caribbean, Inc. and Bristol Laboratories Corporation, Mayaguez Air Conditioning and Syncor Industrial Corp., Puerto Rico Aqueduct and Sewer Authority and Sea Electronics Aids, Inc., Westinghouse De Puerto Rico, Inc. and Westinghouse Electric Corporation.

John C. Chambers, Jr., *Richard A. Flye*, *Susan Kunst Boushell*, *McKenna, Conner & Cuneo* and *Bruce Adler* on brief for Union Carbide Corporation, Amicus Curiae.

Gerard Lederer, General Counsel, on brief for United States Conference of Mayors, Amicus Curiae.

October 26, 1989

BREYER, *Circuit Judge.* This appeal concerns the meaning of an exception in the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*, a statute that regulates the disposal of solid wastes. The Act, among other things, permits both the federal government and private citizens to ask a court for injunctive relief against any person connected with the handling, storage, treatment, or disposal of

> any solid waste or hazardous waste [which] may present an imminent and substantial endangerment to health or the environment.

42 U.S.C. § 6973(a) (authorizing administrator to bring suit); *see* 42 U.S.C. § 6972(a)(1)(B) (authorizing citizens' suits to enforce "imminent and substantial endangerment" provision) (see Statutory Appendix). But, the Act specifies that these wastes do "not include solid or dissolved material *in domestic sewage.*" 42 U.S.C. § 6903(27) (emphasis added). Do the words "in domestic sewage" refer to the *kinds* of sewage that ordinarily emanate from houses—sewage that EPA calls "untreated sanitary wastes?" *See* 40 C.F.R. § 261.4(a)(1)(ii). If so, the exception may include factory wastes that mix with this kind of "sanitary" sewage, say, sewage emanating from bathrooms at the workplace, and the exception is then quite broad. Or do the words "in domestic sewage" refer, as well, to the point of origin of the sewage? Do they mean that the wastes must, in fact, come from houses? If so, the exception is narrow, for it does not embrace solid industrial material mixed with sewage coming from workplace bathrooms.

We conclude that the narrower reading of the exception—the reading that refers to point of origin—is the correct reading. Consequently, the plaintiffs in this case may proceed in their efforts to prove that RCRA entitles them to injunctive relief. *See* 42 U.S.C. § 6972.

I.

Background

The defendants in this case own factories within (or are otherwise connected with) a large industrial park near Mayaguez, Puerto Rico (the "Park"). The Park contains 33 industrial plants. Sewer lines connect the plants to a major, privately owned sewer line; that major private line, in turn, connects with a publicly owned sewer line that runs outside the Park to a publicly owned sewage treatment plant (called, in environmental jargon, a POTW, or publicly owned treatment work). At the time the plaintiffs brought this suit, both the major, private line and the publicly owned line contained *only* wastes from the industrial park; they did not connect with lines running from any private houses. *See Comite pro Rescate de la Salud* v. *PRASA*, 693 F. Supp. 1324, 1330 n.11 (D.P.R. 1988). There is also a second, different sewer system within the Park, which collects rainwater and dumps it into a nearby river; we shall call this second system the "rainwater system."

The plaintiffs (a group of seven individuals and a community organization called, in English, the Committee to Rescue Health) brought this lawsuit claiming that the defendants, in disposing of their industrial wastes, violated several different environmental laws. They said, for one thing, that quite a few of the defendants violated the Clean Water Act by dumping industrial wastes into the rainwater system, thereby discharging those wastes into the river without necessary permits. 33 U.S.C. § 1311. They said, for another thing, that various defendants violated the Clean Air Act by discharging certain noxious fumes, through chimneys and flues, into the outer air. 42 U.S.C. §§ 7411, 7412, 7475. They added that various defendants violated the basic regulatory provisions of RCRA by discharging certain solid, hazardous wastes through their regular sewer system without keep-

ing proper records or obtaining necessary permits. 42 U.S.C. §§ 6921-6934. Finally, and particularly important in terms of this appeal, they claimed that the regular sewer lines were leaking, emitting fumes and other substances that posed an "imminent and substantial endangerment" to health and the environment, to stop which they sought an injunction under RCRA's "citizen suit" provision, § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B).

The district court dismissed all the RCRA claims for a legal reason. In its view, the conceded fact that all the solid industrial wastes in the regular sewer system (including the sources of noxious fumes) mixed with untreated sanitary wastes, such as waste from toilets at the workplace, brought the defendants within the scope of RCRA's exception for "solid or dissolved material in domestic sewage." 42 U.S.C. § 6903(27). This dismissal (along with the court's dismissal of certain related pendent state tort law claims) affected 15 of 23 defendants, and it amounted to a dismissal of all claims against 6 of those 15. Five of those 6 defendants, supported by plaintiffs, asked the district court to enter a final judgment in their favor pursuant to Fed. R. Civ. P. 54(b) (permitting court to enter a final judgment on "one or more but fewer than all the claims" in an action involving multiple claims). The court did so. The plaintiffs now appeal, challenging the lawfulness of the district court's dismissal of their RCRA *injunctive* action. (They have dropped their RCRA "regulatory" claims.)

II.

Jurisdiction

At oral argument we asked the parties to submit briefs to help us determine whether we have jurisdiction to hear this appeal—specifically, whether Fed. R. Civ. P. 54(b)'s preconditions for entry of a "final judgment" on fewer than all claims in an action were satisfied. *See*

Consolidated Rail Corp. v. *Fore River Ry. Co.*, 861 F.2d 322, 325 n.2 (1st Cir. 1988) (appellate court should consider Rule 54(b) jurisdiction *sua sponte*); *Spiegel* v. *Trustees of Tufts College*, 843 F.2d 38, 42-43 (1st Cir. 1988) (noting, in light of policy "against the scattershot disposition of litigation . . . that entry of judgment under the rule should not be . . . routine," and explaining preconditions). After considering the briefs and reading the record, we conclude that Rule 54(b) permits the appeal.

Rule 54(b) reiterates the ordinary principle that a judicial decision does not "terminate" an action—it is not normally "final" for purposes of appeal—if it "adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties." Fed. R. Civ. P. 54(b). But, the Rule contains an important exception:

> When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties[, but] only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Fed. R. Civ. P. 54(b). The exception helps avoid hardship, particularly in complex, multiparty litigation; it permits a winning party to force a losing party to appeal quickly in respect to certain claims or litigants, thereby disentangling the winning party from lengthy, time consuming litigation. *See Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 432 (1956); *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511-12 (1950). Yet, because it is an exception that threatens potentially unnecessary, piecemeal appeals, the courts must administer it with care, reserving it for instances in which the relevant hardships, or administrative needs, are clear. *See Consolidated Rail*, 861 F.2d at 325; *Spiegel*, 843 F.2d at 42; *Cullen* v. *Margiotta*, 811 F.2d 698, 710 (2d Cir.), *cert.*

denied sub nom. Nassau County Republican Comm. v. *Cullen*, 483 U.S. 1021 (1987).

In our view, this appeal satisfies the exception's preconditions. The case involves both multiple parties and multiple claims. The district court entered a judgment that, as concerns the RCRA claims, is "final," for in respect to 6 of the defendants, it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). *See Curtiss-Wright Corp.* v. *General Electric Corp.*, 446 U.S. 1, 7 (1980); *Sears, Roebuck & Co.*, 351 U.S. at 436 (judgment that "ultimate[ly]" disposes of at least one claim in a multiple-claim action is "final" for Rule 54(b) purposes). The district court gave an "express direction for the entry of judgment." *See* Fed. R. Civ. P. 54(b). And, the court made "an express determination that there is no just reason for delay." *See* Fed. R. Civ. P. 54(b).

The district court did not "make specific findings setting forth" its reasons, *see Spiegel*, 843 F.2d at 43; *Cullen*, 811 F.2d at 711 ("certification must be accompanied by a reasoned, even if brief, explanation"), but we are prepared to overlook that fact here in light of a record that makes those reasons clear enough. *Compare Consolidated Rail*, 861 F.2d at 326 *and Spiegel*, 843 F.2d at 44 (in the absence of a statement of reasons, the appellate court, while foregoing "deference," may nonetheless allow appeal) *with National Bank of Washington* v. *Dolgov*, 853 F.2d 57, 58 (2d Cir. 1988) (per curiam) *and Knafel* v. *Pepsi Cola Bottlers of Akron, Inc.*, 850 F.2d 1155, 1159-60 (6th Cir. 1988) (refusing to permit appeal because district court failed to analyze Rule 54(b) factors).

Several facts distinguish the present case from *Consolidated Rail* and *Spiegel*, in which we found entry of a Rule 54(b) judgment improper. *Consolidated Rail* and *Spiegel* both involved a single plaintiff presenting mul-

tiple claims against a single defendant; hence the action remained pending as to *all* of the parties despite the partial judgment entered. *See Consolidated Rail*, 861 F.2d at 326 (one railroad company sued another to recover fees allegedly collected on its behalf; district court granted summary judgment for plaintiff on three counts; defendant sought to appeal while a fourth count requesting identical relief was still pending); *Spiegel*, 843 F.2d at 44 (teacher claimed defendant denying her tenure violated several different laws; district court found some of the laws were not violated; teacher sought to appeal while similar claims under other laws were still pending against defendant).

In contrast, the plaintiffs in the present case originally sued 23 defendants; the RCRA judgment completely terminates the plaintiffs' case against 6 of them. Although all of the plaintiffs' claims arise out of waste disposal at the Park, their RCRA claims do not simply repeat their Clean Water Act or Clean Air Act claims. The RCRA claims rest primarily upon the emission of noxious fumes, coming from industrial waste matter in the regular sewer pipes that run through the industrial park. The Clean Water Act claims rest primarily upon the discharge of waste from the rainwater system into the river. The Clean Air Act claims rest primarily upon the emission of fumes, not from the sewer pipe, but from chimneys and flues. The RCRA regulatory requirements differ from those of the Clean Water and Clean Air acts; and neither of the latter acts permits the type of citizens' injunctive action—to stop waste management activities that threaten "imminent and substantial endangerment" —now before us.

Moreover, many of the other defendants have settled; the remaining claims against the remaining defendants may take considerable time to try; and, given the rather small overlap in claims, it seems unlikely that a determination of the remaining claims would moot (or lead to

settlement of) the issues on this appeal. *Cf. Consolidated Rail*, 861 F.2d at 326 (finding that a favorable decision on the claim remaining in the district court would moot the issue on appeal); *Speigel*, 843 F.2d at 45-46 (finding that no significant, special hardship would be caused by delay). For these reasons, this case is sufficiently different from *Consolidated Rail* and *Spiegel* to warrant a different result. We therefore turn to the merits.

II.

The Domestic Sewage Exception

We now turn to the meaning of the "domestic sewage" exception. The particular RCRA provisions at issue, §§ 7002 and 7003, permit private citizens and the government to bring injunctive actions to stop the dangerous handling or disposal of "any solid waste or hazardous waste." 42 U.S.C. §§ 6972, 6973. RCRA defines "hazardous waste" as a special kind of "solid waste," 42 U.S.C. § 6903(5); hence the scope of the words "hazardous waste" is limited by RCRA's definition of the words "solid waste." RCRA's definitional section says that "solid waste"

> means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, *but does not include solid or dissolved material in domestic sewage* . . . .

42 U.S.C. § 6903(27) (emphasis added). If the term "domestic sewage" means sewage that, in fact, *comes from residences*, the district court should not have dismissed the plaintiffs' case, for their complaint indicates that the relevant industrial waste was mixed with "untreated sanitary waste"—the kind of waste one might

find in homes—but that this waste originated at the workplace, not in residences. We agree with the plaintiffs, and the amicus Environmental Protection Agency, that this is just what the language means.

First, the word "domestic" (coming from the Latin "domus" or "house") in ordinary English means "relating to the household or the family . . . connected with the supply, service, and activities of households and private residences." *Webster's Third New International Dictionary* 671 (1976). Following the Supreme Court, "'we assume that the legislative purpose is expressed by the ordinary meaning of the words used.'" *United States* v. *James*, 478 U.S. 597, 604 (1986) (quoting *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982)). *Accord Allende* v. *Shultz*, 845 F.2d 1111, 1116-17 (1st Cir. 1988).

Second, the statutory provision defines "solid waste," not simply in terms of *type* of material, but also in terms of *source*. Thus, it speaks of material "resulting from industrial, commercial, mining, . . . agricultural . . . and . . . community" operations and activities and then contrasts "domestic" sewage. 42 U.S.C. § 6903(27). In context, exempt "*domestic* sewage" therefore seems to refer, not simply to *type*, but also to *source*. Indeed, one suspects the statute's drafters would have used other words, such as the EPA's term "sanitary wastes," had they had only type, not source, in mind.

Third, to interpret the word as the defendants suggest, as referrring only to type, might make it difficult for Congress to achieve its purpose in writing the injunctive RCRA provision. After all, most factories and industries have toilets for workers; industrial and sanitary wastes may therefore often mix in the pipes below the building; yet it is difficult to believe Congress would wish to exempt potentially large amounts of industrial

waste from the statute's scope simply because they mix with some small amount of bathroom sewage.

Fourth, the legislative history suggests in various ways that Congress intended that the injunctive provision have a rather broad scope. *See, e.g.*, H.R. Rep. No. 198, 98th Cong., 2d Sess., pt. 1, at 48, *reprinted in* 1984 U.S. Code Cong. & Admin. News 5576, 5607 (amendments "clearly provide that anyone who has contributed or is contributing to the creation, existence, or mainteance of an imminent and substantial endangerment is subject to the equitable authority of Section 7003, without regard to fault or negligence"); S. Rep. No. 284, 98th Cong., 1st Sess. at 59 ("An endangerment means a risk of a harm, not necessarily actual harm, and proof that the past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste may present an imminent and substantial endangerment is grounds for an action seeking equitable relief.") (citations omitted). *See also United States* v. *Waste Industries, Inc.*, 734 F.2d 159, 164 (4th Cir. 1984) (Congress "designed [§ 7003] to deal with situations in which the regulatory schemes break down or have been circumvented . . . [Section 7003 is] a broadly applicable section dealing with the concerns addressed by the statute as a whole."). In this legislative context, it would seem somewhat anomalous to interpret the *exception* broadly and thus significantly *narrow* the statute's reach.

Finally, and most importantly, we interpret the statute as reflecting a congressional intent to give EPA considerable authority itself to interpret language like "domestic sewage" and thereby fix, at the boundaries, the precise scope of the exception. The definitional section uses highly general terms, which are neither perfectly "clear," nor clearly express an "unambiguous" congressional intent as to scope or precise boundaries. *Cf. INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 445-48 (1987) ("substantial deference" to agency interpretation is inappropri-

ate when court can ascertain congressional intent on the precise question at issue); *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 842-43 (1984) (courts will not "defer" to agency's construction of a statute when the statute represents the "unambiguously expressed intent of Congress"). The language in question constitutes a small part of a comprehensive regulatory scheme that Congress entrusted the EPA to administer, sensibly and in conjunction with other, related environmental regulatory schemes designed to secure clean water, clean air, and a safe environment. *See, e.g.*, 7 U.S.C. § 136 *et seq.* (Federal Insecticide, Fungicide, and Rodenticide Act); 15 U.S.C. § 2601 *et seq.* (Toxic Substances Control Act); 33 U.S.C. § 1251 *et seq.* (Clean Water Act); 42 U.S.C. § 300f *et seq.* (Safe Drinking Water Act); 42 U.S.C. § 7401 *et seq.* (Clean Air Act); 42 U.S.C. § 9601 *et seq.* (Comprehensive Environmental Response, Compensation, and Liability Act). *See also* 42 U.S.C. § 6905 (instructing EPA to "integrate all [RCRA provisions] for purposes of administration and enforcement and . . . avoid duplication, to the maximum extent practicable, with the appropriate provisions of [other environmental protection acts]"); H.R. Rep. No. 899, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Admin. News 3608, 3628 ("The term 'solid waste disposal' is defined to exclude organic solids in untreated domestic sewage, which are already subject to the Federal Water Pollution Control Act."). The agency either has, or will develop, the type of experience that will permit it properly to mesh these related statutes, both to avoid senseless or overly harsh results, and better to fulfill their overall environmental objectives. Thus the proper application of the definitional exception raises the very sort of interstitial legal question, related to proper administration of a complex statutory scheme, to which an agency is often in a better position than a court to offer a proper answer. And, that being so, a court can appropriately infer an "implicit" congressional delegation of interpretive au-

thority to the agency. All this is to say that this is just the kind of case in respect to which the Supreme Court has instructed us, in *Chevron*, to accord "considerable weight" to "an executive department's construction" of the statute. *Chevron*, 467 U.S. at 844; *see Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565 (1980) (where Congress has left "interstitial silences within a statute," judges should be "attentive[] to the views of the administrative entity appointed to apply and enforce" the statute); *Mayberg* v. *Secretary of Health and Human Services*, 740 F.2d 100, 106 (1st Cir. 1984) (contrasting "interstitial" questions of law, related to the proper administration of the statute, with more general, more important legal questions that Congress is unlikely to have wished the agency primarily to answer). And, once we give that "weight" to the agency's narrow construction of the exception, the other considerations mentioned earlier are more than sufficient to convince us to follow that construction.

The defendants reply to these arguments by pointing to a specific EPA regulation, written in respect to *other* parts of the RCRA statute, which says

> (a) *Materials which are not solid wastes.* The following materials are not solid wastes for purposes of this part: (1) (i) Domestic sewage; and (ii) Any mixture of domestic sewage and other wastes that passes through a sewer system to a publicly-owned treatment works for treatment. *"Domestic sewage" means untreated sanitary wastes that pass through a sewer system.*

40 C.F.R. § 261.4 (emphasis added). The defendants note that the last sentence of this regulation defines "domestic sewage" by referring only to the *type* of waste, not to its *source*; they infer that the definition includes as "domestic sewage" sanitary wastes originating at the workplace; and they argue that EPA is bound by this definition.

We do not accept this argument for two reasons. First, EPA denies that this definition includes sanitary wastes originating in factories; it says that the definition simply refers to the kind of *residential* waste at issue; the regulation's silence about source does not mean that source is irrelevant. EPA's reading of its regulation is not totally unreasonable; and, in light of an agency's considerable legal authority to interpret its own regulations, this argument is dispositive. *See Ford Motor Credit Co.*, 444 U.S. at 565 (courts should defer to agency's interpretation of its own regulation "unless demonstrably irrational"); *United States* v. *Larionoff*, 431 U.S. 864, 872 (1977) (agency interpretation of its own regulations is " 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation' ") (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965) (same); *Donovan* v. *A. Amorello & Sons, Inc.*, 761 F.2d 61, 63 (1st Cir. 1985) ("Courts must allow agencies to interpret their own rules, at least where those interpretations are reasonable.").

Second, as we just mentioned, the definitional regulation applies "only to wastes that also are hazardous *for purposes of* the regulations implementing *Subtitle C* of RCRA." 40 C.F.R. § 261.1(b)(1) (emphasis added). Sections 7002 and 7003 are not part of Subtitle C. Indeed, the regulation goes on to say

> A material which is not defined as a solid waste in this part, or is not a hazardous waste identified or listed in this part, *is still a solid waste* . . . if . . . in the case of section 7003 the statutory elements are established.

40 C.F.R. § 261.1(b)(2) (emphasis added). Since Congress had not yet enacted § 7002(a)(1)(B) when EPA wrote this regulation, we take § 7003 to stand for the nearly identical § 7002(a)(1)(B) as well.) Defining "solid waste" more narrowly for purposes of Subtitle C

than for purposes of §§ 7002 and 7003 may make sense. Subtitle C contains highly detailed recordkeeping, notification, and permit requirements; to ease administrative burdens, EPA may want to include those factory pipes that contain only a little sanitary waste, but exclude those that contain little else. Sections 7002 and 7003, on the other hand, are invoked only to respond to imminent and substantial endangerments to health or the environment; in such a context, involving a present threat to public welfare and no ongoing administrative duties, EPA may want to include even those factory pipes that contain a relatively small proportion of industrial wastes.

In any event, why given the general broad language of the entire definitional section, could not EPA define the exception's scope somewhat differently for purposes of different parts of the RCRA statute? We concede that a court might find it difficult to uphold even minor variations in an agency's interpretation and application of the same statutory words if the *reason* for the court's deference to administrative interpretations," *Chevron*, 467 U.S. at 844, were the court's belief that historical or administrative circumstances mean that the agency *likely knew better* what Congress had in mind, *see Mayburg*, 740 F.2d 100 at 105-06. The court might ask how Congress, using a single set of words in a single statutory sentence, could have meant several different things. However, where the *reason* for the court's "deference" reflects its belief that Congress, in effect, *delegated* to the agency a degree of interpretive power, it does not seem odd to find the agency interpreting the same words somewhat differently as they apply to different parts of the statute in order better to permit that statute to fulfill its basic congressionally determined purposes. Had the statute *expressly* delegated the authority to the EPA to decide the precise scope of the various parts of the statutory definition, *see* 42 U.S.C. § 6903(27), under different parts of the statute, it would not seem at all odd to find the EPA tailoring its scope to fit the needs and objectives

of the statute's different parts. Why should the EPA not have somewhat similar authority, at least to create minor differences, where the delegation is *implicit*, where the courts infer a congressional delegatory intent from the nature of the overall regulatory scheme, its heavy dependence upon sensible administration for its success, and the rather interstitial nature of the particular legal question—where such are the reasons for what the Supreme Court in *Chevron* calls "deference?" *See Chevron*, 467 U.S. at 844 (court may not substitute its own construction for a reasonable agency interpretation when Congress implicitly delegated authority to the agency to elucidate a specific statutory provision); *Mayburg*, 740 F.2d at 106 ("[I]f Congress is silent, courts may still infer from the particular statutory circumstances an *implicit* congressional instruction about the degree of respect or deference they owe the agency on a question of law.") (emphasis in original).

We mention this last point particularly because the record suggests there may have been a significant factual change since the plaintiffs filed the original complaint in this case. As we said at the outset, the Park's sewer pipe runs from the Park to a public sewer line. Before December 1987, that public line ran to a publicly owned sewage treatment work (POTW) which did not receive sewage from residences. Since December 1987, however, the Park's sewage has been treated at another POTW which also receives sewage from residences outside the Park. Thus defendants' sewage now appears to mix with "domestic sewage" in the public line. Consequently, the district court, in working with the words "in domestic sewage," may have to define the scope of the word "in." And, the scope of that word may vary, depending upon, for example, 1) whether a householder has poured down the cellar sink a caustic waste that will mix with "sanitary waste" after a mere thirty foot pipeline voyage on its own, or 2) whether a plant pours down an industrial sink a caustic waste that will eventually mix, in a city

sewer system, with residential "sanitary waste" after a three hundred foot pipeline voyage on its own. We believe that EPA's views are helpful to courts asked to resolve such statutory questions. We note that the House Report, responding to the expressed fear that creation of "private citizen" actions could lead to different, potentially conflicting, legal interpretations, stated:

> It is expected that EPA and the Department of Justice will carefully monitor litigation under this provision and file, where appropriate, *amicus curiae* briefs with the court in order to assure orderly and consistent development of caselaw in this area.

H.R. Rep. No. 198, 98th Cong., 1st Sess. 53, *reprinted in* 1984 U.S. Code Cong. & Admin. News 5576, 5612. And we add that, in our view, it will be helpful if EPA continues to participate in this case, indicating its views, where appropriate, to the district court, as it continues to work with this highly complex statute.

For these reasons, the judgment of the district court is

Vacated and the case is remanded for further proceedings consistent with this opinion.

Statutory Appendix

42 U.S.C. § 6903(5) (1982):

> The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may (A) cause, or significantly contribute to an increase in mortality or an increase in serious, irreversible, or incapacitating reversible, iliness, or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(27) (1982):

> The term "solid waste" means any garbage, refuse, sludge from a waste treatment plan, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials-in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of Title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923).

42 U.S.C. § 6972(a)(1)(B) (Supp. 1987):

> [Except as provided in subsection (b) and (c) of this section, any person may commence a civil ac-[t]ion on[] his own behalf (1) . . . (B)] against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or pres-

ent owner or operator of a treatment, storage or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment . . . .

42 U.S.C. § 6973(a) (Supp. 1987):

Notwithstanding any other provision of this chapter, upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court against any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility) who has contributed or who is contributing to such handling, storage, treatment, transportation, or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both. . . .

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 89-1091

COMITE PRO RESCATE DE LA SALUD, ETC., *et al.*,
Plaintiffs, Appellants,

v.

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY, ETC., *et al.*,
Defendants, Appellees.

JUDGMENT

Entered: October 26, 1989

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is vacated and the cause is remanded to the district court for further proceedings consisted with the opinion issued this date.

Costs to appellants.

By the Court:

FRANCIS P. SCIGLIANO
Clerk

By /s/ [Illegible]
Chief Deputy Clerk

[cc: Messrs. Roisman, Carr, Zahler, Chambers and Lederer]

APPENDIX C

UNITED STATES DISTRICT COURT
D. PUERTO RICO

Civ. No. 87-1643 (JP)

COMITE PRO RESCATE DE LA SALUD, *et al.*,
Plaintiffs,

v.

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY, *et al.*,
Defendants.

July 10, 1988

Anthony Z. Roisman, Cohen, Milstein & Hausfeld, Washington, D.C., Leonard W. Schroeter, Michael E. Withey, Schroeter, Goldmark & Bender, Seattle, Wash., Pedro J. Varela, Hato Rey, P.R., for plaintiffs.

Irwin Flashman, O'Neill & Borges, Hato Rey, P.R., for Westinghouse.

Steven C. Lausell, Jimenez, Graffam & Lausell, San Juan, P.R., for Bristol.

Jose A. Cestero, Andreu Garcia & Andreu Garcia, Hato Rey, P.R., John L. Greenthal, Nixon, Hargrave, Devans & Doyle, Albany, N.Y., for Pridco.

Francisco G. Bruno, Sweeting, Gonzalez & Cestero, San Juan, P.R., Robert Zahler, Shaw, Pittman, Potts & Trowbridge, Washington, D.C., for Perkin Elmer.

Geoffrey Stewart, Hale and Dorr, Washington, D.C., Pedro A. Morell, Brown, Newsom & Cordova, Hato Rey, P.R., for Storage Tek.

Enrique Alcaraz Micheli, Bufete Ferrer & Alcaraz, Mayaguez, P.R., for Syncor and Mayaguez Air Cond.

Alberto Rodriguez-Ramos, Martinez, Odell, Calabria & Sierra, Angel R. De Corral Julia, De Corral & De Mier, Hato Rey, P.R., for Aratex.

Encarnita Catalan Marchan, Puerto Rico Aqueduct & Sewer Authority, Santurce, P.R., Laurie S. Gill, Douglas A. Johns, Palmer & Dodge, Boston, Mass., for Prasa.

Ernesto F. Rodriguez Suris, Hato Rey, P.R., Edilberto Berrios Perez, San Juan, P.R., for Washables and Penntex.

Santiago Mari Roca, Ribas, Biaggi & Mari, Mayaguez, P.R., for Sea Electronics and Stieffel.

Osvaldo Perez-Marrero, Hato Rey, P.R., for Equa Industries.

Jose A. Rivera Mercado, Jose A. Rivera Cordero, Hato Rey, P.R., for Equa and Propper.

Goldman & Antonetti, Santurce, P.R., for Propper.

Charles A. Cordero, Cordero, Miranda & Pinto, Old San Juan, P.R., for Matouk.

Jose M. Biaggi Junquera, Mayaguez, P.R., for Ariela.

Eduardo Estrella, Fiddler, González & Rodriguez, San Juan, P.R., for Cerveceria India.

OPINION AND ORDER

PIERAS, District Judge.

This case concerns alleged violations of federal environmental laws in the Barrio Guanajibo Industrial

Park, Mayaguez, Puerto Rico, which have adversely affected the health and environment of the named plaintiffs. Most of the defendants have moved to dismiss the complaint for failure to state a claim, Fed.R.Civ.P. 12(b)(6), or for lack of subject matter jurisdiction, Fed. R.Civ.P. 12(b)(1). The motions to dismiss raise the following significant issues: 1) Whether the plaintiffs have stated a claim under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901, *et seq.*;[1] 2) whether the plaintiffs have supplied adequate notice of in- of the Clean Water Act (CWA), 33 U.S.C. § 1151, *et seq.*, and the Clean Air Act (CAA), 42 U.S.C. § 7401, *et seq.*, so as to grant subject matter jurisdiction; 3) whether the plaintiffs have supplied adequate notice of intent to sue under RCRA, CWA, and CAA so as to grant subject matter jurisdiction; 4) whether the plaintiffs have stated a claim against the corporate-parent defendants; and 5) whether the Court should exercise pendent jurisdiction over the nuisance, negligence, trespass, and strict liability claims. Of these five issues, the interpretation of RCRA is clearly paramount.

I. THE RESOURCE CONSERVATION AND RECOVERY ACT (RCRA)

The plaintiffs allege that the corporate defendants[2] are violating RCRA sections 3010(a), 3005(a), and 7003(a)

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[1] Defendant Westinghouse contends that its RCRA-based motion to dismiss is based on Fed.R.Civ.P. 12(b)(1), so the plaintiffs have the burden of proving jurisdiction. The Court finds that there is subject matter jurisdiction over this case because the plaintiffs' request for relief under federal law is not frivolous, and in fact, it could be sustained if we give RCRA plaintiff's construction. *See Wheeldin v. Wheeler*, 373 U.S. 647, 649, 83 S.Ct. 1441, 1444, 10 L.Ed.2d 605 (1963); *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

[2] Bristol Meyers Company, Bristol Laboratories, Corp., Bristol Caribbean (referred to jointly as "Bristol"); Ara Services, Inc., Aratex, Inc., (referred to jointly as "ARA"); Ariela, Inc.; Cerve-

by discharging hazardous materials into sewer systems of Barrio Guanajibo Industrial Park. In relevant part, section 3010(a), 42 U.S.C. § 6930, requires a generator of hazardous wastes to file a notification of its activity with the Environmental Protection Agency (EPA). Section 3005(a), 42 U.S.C. § 6925(a), requires owners or operators of hazardous waste storage and disposal facilities to obtain permits from the EPA. Section 7003, 42 U.S.C. § 6973, prohibits hazardous waste activities that may present an imminent and substantial endangerment to health or the environment. In addition, § 7002, 42 U.S.C. § 6972, grants private citizens the right to enforcement of the above provisions in district court.

The plaintiffs make similar allegations against the public corporations.[3] Instead of alleging violations arising from hazardous waste generation, however, the plaintiffs claim that PRASA and PRIDCO store and transport hazardous wastes without proper notification and permits, to the imminent and substantial danger to health and the environment.

The defendants argue that the conduct alleged by the plaintiffs—disposal of hazardous wastes in the industrial park's sewer system—is specifically exempted from reg-

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ceria India, Inc. ("India"); Equa Industries, Inc. ("Equa"); Matouk Industries, Inc. ("Matouk"); Mayaguez Air Conditioning ("Mayaguez A/C"); Perkin-Elmer Corporation, Perkin-Elmer Caribbean (referred to jointly as "PEC"); Propper International, Inc. ("Propper"); Sea Electronics Aids, Inc. ("Sea Electronics"); Sportscaribe, Inc.; Stiefel Laboratories, Inc. (both a Florida corporation and a Puerto Rico corporation, referred to jointly as "Stiefel"); Storage Technology de Puerto Rico, Storage Technology Corporation (referred to jointly as "Storage Tech"); Syncor Industries Corporation ("Syncor"); Westinghouse Electric Corporation, Westinghouse de Puerto Rico, Inc. (referred to jointly as "Westinghouse").

[3] Puerto Rico Aqueduct and Sewer Authority (PRASA) and Puerto Rico Industrial Development Company (PRIDCO).

ulation by RCRA. Therefore, the complaint fails to state a claim upon which relief can be granted.

A. *Background*

Federal regulation of hazardous waste is accomplished as a part of solid waste regulation under RCRA, and RCRA applies to hazardous materials only if they fall within the definition of "solid waste."[4] The defendants' discharges are therefore only to be considered "hazardous wastes" if they first fit the definition of "solid waste."[5] The parties in this case agree that the defendants are commercial operations within the meaning of § 6903(27). Therefore, the materials that the defendants discharge should be categorized solid wastes, subject to RCRA, unless one of the exclusions in § 6903(27) applies (see fn 5). The defendants argue that the phrase "does not in-

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[4] The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical chemical, or infectious characteristics may—

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5).

[5] The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial-commercial, mining, and agricultural operations, and from community activities, *but does not include solid or dissolved material in domestic sewage*, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923).

42 U.S.C. § 6903(27) (underscoring added).

clude solid or dissolved material in domestic sewage," known as the Domestic Sewage Exclusion (or "DSE"), exempts their activities from RCRA coverage. The plaintiffs contend that the DSE does not encompass the defendants' activities.

In the RCRA regulations, the EPA describes the Domestic Sewage Exclusion as follows:

> (a) *Materials which are not solid wastes.* The following materials are not solid wastes for the purpose of this part: (1) (i) Domestic sewage; and (ii) Any mixture of domestic sewage and other wastes that passes through a sewer system to a publicly-owned treatment works for treatment. "Domestic sewage" means untreated sanitary wastes that pass through a sewer system.

40 C.F.R. § 261.4 (1987). The defendants allege, and the plaintiffs do not contradict the allegations, that whatever materials they discard are dumped into a stream of sanitary wastes that passes through a treatment plant owned by PRASA. In the defendants' view, this situation fits the Domestic Sewage Exclusion perfectly, so the chemical discharges are not regulated in any way by RCRA. The defendants claim that their discharges are instead considered to be subject to the pretreatment standards of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*

The plaintiffs argue that the alleged discharges are included in RCRA's coverage because they do not fit the requirement of passing "*through* a sewer system to a publicly owned treatment works for treatment." 40 C.F.R. § 261.4(a)(1)(ii) (emphasis added.) The plaintiffs contend that they have not sued to stop discharges that are treated at a treatment plant; rather they have sued to stop the discharge of wastes that fail to pass through the sewers and remain stuck in the system, damaging health and the environment through leakage or evaporation.

The question before the Court at this time is one of statutory interpretation: assuming plaintiffs' factual allegations to be true, does the Domestic Sewage Exclusion apply to wastes discharged into a sewer system so defective that the wastes never reach a treatment plant? A number of defendants have supplemented their motions to dismiss with affidavits, exhibits, and stipulations of fact, which ordinarily has the effect of converting the motions to ones for summary judgment. Fed.R.Civ.P. 12(b). On the narrow issue of interpreting the Domestic Sewage Exclusion, however, the facts added by this evidence are immaterial; so the Court considers the motions as ones to dismiss the complaint under 12(b)(6).

B. *Discussion*

The Court's analysis begins with the language of RCRA, which seems to indicate that the Domestic Sewage Exclusion exempts the defendants' alleged disposal practices from RCRA regulation. Section 6903(27) excludes material "*in* domestic sewage." Domestic sewage is defined as untreated sanitary waste that passes through a sewer system. 40 C.F.R. 261.4(a)(1)(ii).[6] A straightforward reading of this language makes a producer or handler of hazardous waste (as otherwise defined) subject to RCRA if its discarded materials are, for example, buried, placed in caves or mines, placed in landfills, injected into wells, or burned, but not if those materials are dumped into a sewer leading to a publicly owned treatment plant (POTW). This construction of the statute is supported by the introduction section of EPA's request for comments on 40 C.F.R. § 261.4(a):

> "EPA has, therefore, decided that a waste falls within the domestic sewage exemption *when it first*

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[6] The term "Domestic Sewage" is not defined in RCRA itself, only in the regulations.

> *enters a sewer system* that will mix it with sanitary wastes prior to storage or treatment by a POTW."

45 Fed. Reg. 33084, 33097 (1980).

The plaintiffs argue that this interpretation of the DSE leaves a huge loophole that could not have been intended by Congress. The plaintiffs urge a broader reading of RCRA, noting that Congress intended "cradle-to-grave" regulation of hazardous wastes as a means of protecting health and the environment. Indicators of such a Congressional intent appear on the face of RCRA: 42 U.S.C. § 6902 establishes the objective of promoting "the protection of health and the environment;" § 6902(a)(4) sets a goal of assurance that "hazardous waste management practices are conducted in a manner which protects human health and the environment;" and § 6902(b) formulates a national policy "that wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment."

The parties agree that Congress enacted the DSE with the intention that the excluded wastes would be regulated by the Clean Water Act. The plaintiffs argue, however, that broad application of the Exclusion to this case not only defeats RCRA's purpose of protecting health and the environment, it is also inconsistent with the purposes of the Clean Water Act.

The Clean Water Act is a broad remedial statute intended to control discharges of pollutants into the nation's navigable waters. *See e.g., U.S. v. Velsicol Corp.*, 438 F.Supp. 945 (W.D.Tenn.1976). To this end, the Act provides for establishment of effluent standards for treatment plants as well as pretreatment standards for discharges into sewers that lead to treatment plants. The rationale for pretreatment standards is two-fold: first,

some substances are incompatible with the design of the treatment plant and interfere with the plant's treatment of other wastes; and second, some substances are not affected by the treatment plant and pass directly through it into tributaries or navigable waters. 33 U.S.C. § 1317 (b) (1).[7]

The pretreatment standards represent the portion of the CWA that can be used to control the defendants' discharges into the sanitary sewers. But plaintiffs argue that because the Clean Water Act only aims to prevent interference and pass-through, it does not protect the public from sewer systems that leak, from traps that fail, and from other health dangers arising before the sewage reaches the treatment plant. The plaintiffs contend that because the CWA pretreatment standards have a limited purpose, the dimensions of RCRA's Domestic Sewage Exclusion should be drawn according to that purpose. That is, the DSE should be construed to exempt wastes only to the extent that they are actually controlled by the CWA pretreatment standards.

The plaintiffs claim that this interpretation of § 6903 (27) is consistent with EPA's interpretations. Plaintiffs read the phrase "passes through" in 40 C.F.R. 261.4 as limiting the exclusion to the portions of the discharges that pass all the way through the sewer system and actually reach the treatment plant. The preamble to the regulation, cited on page 6 above, states that wastes are excluded when they first enter the sewer system—and plaintiffs read it to apply only to wastes that actually reach the treatment plant for storage or treatment. *See* 45 Fed.Reg. 33097. In other words, wastes that reach POTW are excluded from RCRA from the moment they are discharged; but wastes that never reach the POTW are never excluded from RCRA.

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[7] These problems are referred to as "interference" and "pass-through."

The plaintiffs argue that there is therefore nothing in RCRA or the regulations that is inconsistent with their construction of the Domestic Sewage Exclusion. Moreover, as remedial public health legislation, RCRA ought to be construed liberally, with a narrow reading of any exceptions to its application. *See United States v. An Article of Drug, Etc.*, 394 U.S. 784, 800 (1969); *Southern Ry. Co. v. Occupational Saf. EH. Review Comm.*, 539 F.2d 335, 338 (4th Cir. 1976).

The plaintiffs raise two other arguments that are variations on their primary theory of the inapplicability of the Domestic Sewage Exclusion. The plaintiffs argue that the DSE applies only at the time the waste enters property owned by PRASA, pursuant to 40 C.F.R. § 260.10 [8] and 33 U.S.C. § 1362(4).[9] Because PRIDCO or the private defendants allegedly owned some of the sewer mechanisms, and some of the wastes allegedly escape before reaching the lines owned by PRASA, the plaintiffs claim that some wastes are escaping before the DSE begins to

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[8] Section 260.10 is the "Definitions" section of the hazardous waste regulations. The following is among the definitions:

> "Publicly owned treatment works" or "POTW" means any device or system used in the treatment (including recycling and reclamation) of municipal sewage or industrial wastes of a liquid nature which is owned by a "State" or "municipality" (as defined by section 502(4) of the CWA). This definition includes sewers, pipes, or other conveyances only if they convey wastewater to a POTW providing treatment.

40 C.F.R. § 260.10 (1987).

[9] The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 1288 of this title.

33 U.S.C. § 1362(4).

operate. In essence, the plaintiff is offering a third option for delimiting the DSE. The defendants claim the Exclusion applies at the point of discharge; plaintiffs earlier argued essentially that the Exclusion applies at the point of treatment; and in the alternative, the plaintiffs claim that the Exclusion applies at the point of public ownership. This alternative interpretation finds no support in the regulations. The plaintiffs contend that § 260.10 defines "sewer system" as "that system owned by the POTW." However, no definition for "sewer system" appears in the regulations. The language most similar to that claimed by the plaintiffs is the POTW definition quoted in footnote 8, above. The language of § 261.4 (6) (1) (ii) clearly contradicts the plaintiff's construction. That section implicates the DSE whenever hazardous waste passes through a sewer system to a POTW. A sewer system is obviously thought to differ from a POTW, and plaintiffs' attempt to define the system as a sub-part of the POTW is incorrect.

Finally, plaintiffs argue that the Domestic Sewage Exclusion applies only to wastes that are mixed, at some point, with domestic sewage as opposed to industrial sewage, citing an April 15, 1988, Guidance Document by the EPA.[10] The plaintiffs allege that the treatment plant at the industrial park treats or treated only industrial sewage, so any discharges destined for that plant were covered by RCRA.[11] However, there is nothing in the statute

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[10] "Industrial waste which mixes with sanitary waste from on-site sanitary facilities for the employees does not necessarily fall under the domestic sewage exemption, the industrial waste must also mix in the municipal sewer system with untreated sanitary wastes from non-industrial sources."

EPA Document, Guidance for Implementing Permit-By-Rule Requirements at POTWs, p. 6. (April 15, 1988).

[11] It appears that the parties agree that the treatment plant located in Barrio Guanajibo ceased operating in late 1987 and that

or regulations that requires sanitary wastes to derive solely from industrial sources. *See* 40 C.F.R. 261.4(a)(1)(ii). The natural reading of these provisions triggers the DSE whenever hazardous wastes are mixed with domestic wastes, regardless of the source of the domestic wastes. Thus the application of the DSE in this case is the same for both of PRASA's treatment plants.

In support of their interpretation of the Domestic Sewage Exclusion, the defendants rely first on the plain language of the statute and second on the unworkable results of following plaintiff's argument to its conclusion. As noted above, the language of RCRA § 6903(27) and 40 CFR 261.4 seem to indicate that the DSE was intended to exempt producers and handlers of hazardous materials whenever the materials are dumped into a sewer that leads to a POTW.

The DSE has been subject to continuing congressional and administrative attention since its enactment in 1980. RCRA was amended in 1984, and Congress specifically required re-evaluation of the DSE. 42 U.S.C. § 6939.[12]

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the industrial park's wastes are now treated in a regional POTW. This fact is nevertheless immaterial because the change in plants is not relevant to the issue of RCRA coverage.

The Court notes that "continuing violation" is not a requisite to a RCRA claim under 42 U.S.C. § 6972(a)(1)(B). This section expressly allows citizens suits to enjoin an imminent and substantial endangerment to health or environment by past and present generators, transporters, or operators of facilities. This is obviously different from the situation in *Gwaltney v. Chesapeake Bay Foundation*, —— U.S. ——, 98 L.Ed.2d 306 (1987) because of the long-term effects of hazardous waste disposal.

[12] The statute reads, in relevant part:

§ *6939. Domestic sewage*

(a) Report

The Administrator shall, not later than 15 months after November 8, 1984, submit a report to the Congress concerning those substances identified or listed under section 6921 of this title which are not regulated under this subchapter by reason

See Cong.Rec. H9149-9153 (daily ed. Nov. 3, 1983). This section mandates a study of the DSE to determine "the extent to which the exclusion is justified and should be modified or eliminated, and the adequacy of pretreatment as a means of dealing with the problem." Cong.Rec. H9150 (Nov. 3, 1983, remarks of Rep. Molinari). The result was a document entitled "The Domestic Sewage Study," presented in February, 1986. Among its findings, the Study identified leakage and evaporation from sewers as potential problems, and it recommended further study. In August, 1986, the EPA issued an Advance Notice of Proposed Rulemaking with respect to implementing the recommendations of the study. 51 Fed.Reg. 30174 (August 22, 1986). And most recently, EPA responded to the comments it received on its proposal. 52 Fed.Reg. 23477, *et seq.* (June 22, 1987). The defendants argue that this entire process—from the original legislation through the continuing consideration of the DSE—indicates that Congress affirmatively intended to exclude hazardous waste from the point of sewer discharge. Both

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of the exclusion for mixtures of domestic sewage and other wastes that pass through a sewer system to a publicly owned treatment works. Such report shall include the types, size and number of generators which dispose of such substances in this manner, the types and quantities disposed of in this manner, and the identification of significant generators, wastes, and waste constituents not regulated under existing Federal law or regulated in a manner sufficient to protect human health and the environment.

(b) Revisions of regulations

Within eighteen months after submitting the report specified in subsection (a) of this section, the Administrator shall revise existing regulations and promulgate such additional regulations pursuant to this subchapter (or any other authority of the Administrator, including section 1317 of Title 33) as are necessary to assure that substances identified or listed under section 6921 of this title which pass through a sewer system to a publicly owned treatment works are adequately controlled to protect human health and the environment.

42 U.S.C. § 6939.

Congress and the EPA are aware of possible problems from leakage and evaporation, and Congress' preferred course of action is to study the magnitude of the problems as well as the feasibility of alternatives before legislating cha[n]ges in the DSE. These problems are not unforeseen aberrations that demand a broad reading of RCRA for the sake of the public welfare. The DSE should therefore be interpreted to include the defendant's practices, even if the plaintiffs' allegations of seepage and vaporization are true.

In consideration of all of the above arguments, the Court finds that the defendants' discharges of hazardous materials into the sewer system are not regulated by RCRA due to the Domestic Sewage Exclusion. Notwithstanding general goal of preventing health and environmental hazards, the Court believes that Congress chose to implement the policies of RCRA according to specific requirements that would guide industry and the public. The RCRA interpretation that excludes wastes upon first entry into a sewer system is a more logical and facile construction. This reading of the statute allows the industrial corporations in Barrio Guanajibo to govern their pollution-control practices in accordance with the method used to dispose of their hazardous chemicals. Each company that discharges chemicals into the sanitary sewer is obligated to comply with the Clean Water Act (CWA). This construction also permits PRASA and PRIDCO to conduct their operations with certainty of procedures.

Under the plaintiffs' proposal, each defendant would be forced to consider its sewer discharges to be both hazardous waste under RCRA and a pollutant under CWA. The facilities would then be required to comply with both regulatory schemes either partially or totally. To make this system worse, each corporate defendant would presumedly be obligated to monitor continually the efficiency of the sewer system. Whenever a functioning system breaks down, the defendant would be brought into the

double regulation of RCRA and the CWA—through events beyond its control.

It seems clear that Congress intended the simpler system advocated by the defendants. The Court reaches this conclusion not only because such a system avoids double regulation but also because the system provides industry, government, and the public with more efficient and predictable bases for making important waste-disposal decisions.

In addition, the DSE would have a tortuous effect on the RCRA scheme if it were to apply only wastes actually treated, and not to all those discharged. Sections 6922 and 6924 of Title 42, for example, establish the standards to be used by EPA in its regulation of hazardous waste.[13]

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[13] Section 6922(a) reads, in relevant part:

Such standards shall establish requirements respecting—

(1) recordkeeping practices that accurately identify the quantities of such hazardous waste generated, the constituents thereof which are significant in quantity or in potential harm to human health or the environment, and the disposition of such wastes;

(2) labeling practices for any containers used for the storage, transport, or disposal of such hazardous waste such as will identify accurately such waste;

(3) use of appropriate containers for such hazardous waste;

(4) furnishing of information on the general chemical composition of such hazardous waste to persons transporting, treating, storing, or disposing of such wastes;

(5) use of a manifest system and any other reasonable means necessary to assure that all such hazardous waste generated is designated for treatment, storage, or disposal in, and arrives at, treatment, storage, or disposal facilities (other than facilities on the premises where the waste is generated) for which a permit has been issued as provided in this subchapter, or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052); and

(6) submission of reports to the Administrator (or the State agency in any case in which such agency carries out a permit

Several of these requirements appear to be nonsensical when applied to the defendants here. Section 6922(a)(5) and 40 C.F.R. Part 262 would require the facilities at

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program pursuant to this subchapter) at least once every two years, setting out—

(A) the quantities and nature of hazardous waste identified or listed under this subchapter that he has generated during the year; . . .

(B) the disposition of all hazardous waste reported under subparagraph (A);

(C) the efforts undertaken during the year to reduce the volume and toxicity of waste generated; and

(D) the changes in volume and toxicity of waste actually achieved during the year in question in comparison with previous years, to the extent such information is available for years prior to November 8, 1984.

Section 6924(a), referring to standards for owners and operators of hazardous waste treatment, storage, and disposal facilities, reads in part:

Such standards shall include, but need not be limited to, requirements respecting—

(1) maintaining records of all hazardous wastes identified or listed under this chapter which is treated, stored, or disposed of, as the case may be, and the manner in which such wastes were treated, stored, or disposed of;

(2) satisfactory reporting, monitoring, and inspection and compliance with the manifest system referred to in section 6922(5) of this title;

(3) treatment, storage, or disposal of all such waste received by the facility pursuant to such operating methods, techniques, and practices as may be satisfactory to the Administrator;

(4) the location, design, and construction of such hazardous waste treatment, disposal, or storage facilities;

(5) contingency plans for effective action to minimize unanticipated damage from any treatment, storage, or disposal of any such hazardous waste;

(6) the maintenance of operation of such facilities and requiring such additional qualifications as to ownership, continuity of operation, training for personnel, and financial responsibility (including financial responsibility for corrective action) as may be necessary or desirable; and . . .

Barrio Guanajibo to complete a manifest each time they discharged hazardous chemicals into the sewer,[14] designating PRASA and PRIDCO as transporters and treatment facilities, and perhaps identifying malfunctioning sewers as containers. In addition, § 6922(b) would require the facilities to certify that a broken sewer is the "practicable method currently available to the generator which minimizes the present and future threat to human health and the environment." 42 U.S.C. § 6922(b). The requirements for PRASA and PRIDCO, as transporters and treatment facilities would be no more logical. *See* § 6924(a) *above*. Moreover, § 6927(e) would require EPA to "thoroughly inspect every facility for the treatment, storage, or disposal of hazardous waste . . . no less often than every two years as to its compliance with this chapter." This provision makes little sense when it requires inspection of facilities that are included in the regulations only by virtue of their malfunctioning sewer systems.

The entire regulatory scheme seems obviously intended to govern the most common or acceptable hazardous waste disposal practices. It does not appear to be applicable to disposal through sewer systems, nor to unintended discharges from faulty sewers. The proper interpretation of RCRA therefore excludes from coverage all hazardous materials dumped into sanitary sewers destined for POTW, from the first entry of the chemicals into the sewer system. Congress did not consider the problems of leakage or vaporization from sanitary sewers significant enough to force an additional remedial structure into the RCRA program. Although there is evidence of continuing congressional and administrative concern over these problems, Congress has chosen not yet to address them under RCRA. This Court cannot use the apparent health and environmental problems as a license to redraft RCRA

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[14] The form of the manifest appears in 40 CFR Part 262, Appendix.

and the DSE. Rewriting RCRA is the sole prerogative of Congress, and this Court must apply the law as it exists at present, not as we think it should read.

This interpretation of RCRA applies equally to all of plaintiffs' RCRA claims, including the allegation of imminent and substantial endangerment under RCRA § 7003. Congress chose to exclude the defendants' practices *by definition* from all RCRA coverage. 42 U.S.C. § 6903(27). Mixtures of hazardous chemicals with domestic waste are not solid waste and therefore not hazardous waste. Although plaintiffs have alleged imminent and substantial danger, they have not alleged that the danger was caused by hazardous waste, within the RCRA definition.

Therefore, because plaintiffs have only alleged conduct that should be protected by the DSE, all RCRA claims are DISMISSED for failure to state a claim upon which relief can be granted.

II. PENDENT CLAIMS

The plaintiffs allege the right to recover, under the laws of Puerto Rico, for nuisance, negligence, trespass, and strict liability. The amended complaint indicates that some of the defendants and all of the plaintiffs are citizens of Puerto Rico. Therefore, there is no diversity jurisdiction, and jurisdiction over the tort claims must be based on pendent jurisdiction. The exercise of pendent jurisdiction is a matter of court discretion, taking into consideration judicial economy, convenience, and fairness to the litigants. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). Because the RCRA claims predominate, the Court's dismissal above provides "a powerful reason to choose not to continue to exercise jurisdiction" over the state-law claims. *Carnegie-Mellon Univ. v. Cohill*, —— U.S. ——, 98 L.Ed.2d 720, 730 (1988). All pendent claims are therefore DISMISSED.

III. CLEAN AIR ACT AND CLEAN WATER ACT

The amended complaint alleges continuous violations of the Clean Air Act (CAA) and Clean Water Act (CWA) against several of the defendants: CAA violations against PRASA, ARA, Ariela, India, Equa, Matouk, Mayaguez A/C, PEC, Propper, Sea Electronics, Sportscaribe, Storage Tech, and Syncor; CWA violations against ARA, Ariela, Equa, PEC, Propper, Sportscaribe, and Stiefel, The defendants variously raise three arguments in support of their motions to dismiss/motions for summary judgment.

First, the defendants claim that the notice given them pursuant to CAA § 304(b)[15] and CWA § 505(b)[16] was deficient according to the requirements of 40 CFR §§ 54.3 and 135.3. As in *National Wildlife Federation v. Consumers Power Co.*, 657 F.Supp. 989 (W.D.Mich.1987). the plaintiffs implicitly acknowledge that they may not have complied fully with the regulations, but they argue that they have fully complied with the statutory requirements—that defendant had actual notice of the matters at issue—and that the Court should excuse their technical non-compliance. *See National Wildlife Federation*, 657 F.Supp. at 998. The notice letters sent by plaintiffs in this case effectively notify the defendants of the activity alleged to constitute a violation (the release of specified toxic pollutants to the ambient air or Rio Hondo); the standards violated (that these pollutants were released without permits); the person or persons responsible for the violations (the defendants); the location of the alleged violations (the defendants' facilities in Barrio Guanajibo Industrial Park); and the full name and address of the persons giving notice. Although the notice letters may have been incomplete, this Court follows *National Wildlife Federation* and finds that the

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[15] 42 U.S.C. § 7604(b).

[16] 33 U.S.C. § 1365(b).

plaintiffs have "sufficiently alleged and established the actual notice that the statute and the regulations require . . ." 657 F. Supp. at 998.

Second, the defendants argue that plaintiffs have failed adequately to allege continuing violations of the CWA and CAA within the meaning of *Gwaltney v. Chesapeake Bay Foundation*, —— U.S. ——, 98 L.Ed.2d 306 (1987). In precis, the amended complaint alleges continuing intermittent violations of the Acts in the past and a continuation of the conditions that led to those violations. The Court holds that such allegations satisfy the good-faith standard of *Gwaltney* and are sufficient to establish jurisdiction. *See also Pawtuxent Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089 (1st Cir.1986). Once jurisdiction has been established, defendants can prevail on a mootness theory if they show that remedial measures have been taken, that the measures are efficacious, and that risk of further violations has been eradicated. *See Chesapeake Bay Foundation v. Gwaltney*, 844 F.2d 170 (4th Cir.1988). The record in this case contains only defendants' conclusive assertions that they have ceased violations of the Acts, and as such the issue of mootness does not arise.

Third, some defendants challenge the substance of the CWA and CAA claims. Plaintiffs and defendants have submitted documents outside the pleadings that tend to support the existence or nonexistence of *prima facie* violations of the Acts. The Court finds that there exists material facts in dispute with respect to the discharge of pollutants without proper permits, and summary judgment would therefore be improper.

Because the Court finds that the plaintiffs' notice letters to be adequate under CWA and CAA, that the plaintiff[]s have properly alleged continuing violations of CWA and CAA, and that there are material facts in dispute with relation to CWA and CAA, the motions to dismiss

the complaint and for summary judgment under these Acts are hereby DENIED.

IV. LIABILITY OF CORPORATE PARENTS

Several defendants, including ARA, PEC, and Storage Tech, have moved for dismissal of the complaints against the American corporate parents. The parent corporations can be held liable for their subsidiaries' conduct if the parents' acts or omissions themselves constitute a tort under the laws of Puerto Rico. *Muñiz v. National Can Corp.*, 737 F.2d 145 (1st Cir.1984). A prerequisite to such liability is the assumption of a duty by the parent corporation. *Muñiz*, 737 F.2d at 148. The Court finds that a question of material fact exists as to the extent the parents assumed responsibility for the environmental issues at their subsidiaries' plants in Barrio Guanajibo. Summary judgment in favor of the parent corporations is therefore premature.

The defendants also argue that the parents cannot be held liable for the federal causes of action against their subsidiaries unless the parent and subsidiary are shown to be in fact one corporation. The Court finds that there exists questions of fact as to the separateness of the parents from their subsidiaries. Therefore, summary judgment on this issue would be inappropriate at this time.

Dismissal for lack of personal jurisdiction would also be premature. Even if summary judgment were ultimately granted against the plaintiff on the tort issues, above, Puerto Rico's long-arm statute would still permit exercise of jurisdiction over persons who have transacted business in Puerto Rico. P.R. Laws Ann. Tit. 32, App. III, R. 4.7. This rule has been found to grant jurisdiction to the full extent of constitutional authority. *Mangual v. General Battery Corp.*, 710 F.2d 15, 19 (1st Cir. 1983). The jurisdictional tests are set out in *Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 904

(1st Cir.1980) and *A.H. Thomas Co. v. Superior Court*, 98 P.R.R. 864 (1970). As noted in *Escude Cruz*, "[considerations of 'fair play and substantial justice' require in each case a careful scrutiny of the defendant's activities," *citing International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The Court finds that the record has not sufficiently been developed on the issue of the parents' contacts with the forum, Puerto Rico. The Court therefore DENIES the motions to dismiss for lack of personal jurisdiction.

Finally, with respect to the American corporate parents, PEC notes that it has never properly been served and asks for dismissal with prejudice. The plaintiffs served PEC by mail, and they argue that such service is permitted by Fed.R.Civ.P. 4(c)(2)(C)(ii). This District Court has held, however, that service by mail is proper only if accomplished within Puerto Rico, unless a federal or state statute specifically provides for service by mail. *San Miguel & Compañia, Inc. v. International Harvester Export Co.*, 98 F.R.D. 572 (D.P.R. 1983). There appears to be no federal or Puerto Rico law specifically providing for service by mail. Therefore, plaintiffs are obligated to serve the non-resident corporate defendants by publication or personal service pursuant to P. R. Laws Ann. Tit. 32, App. III, R. 4.5. Dismissal of the complaint clearly constitutes an overly harsh remedy when there are no allegations of prejudice to the affected defendant. Therefore, the Court ORDERS service by mail upon non-resident corporate defendants to be QUASHED. The plaintiffs are granted leave to serve the corporate parents named in the amended complaint in a manner authorized by the Puerto Rico Rules of Civil Procedure.

V. CLASS CERTIFICATION

The plaintiffs request in the amended complaint certification of a class consisting of past and present workers in the Barrio Guanajibo Industrial Park and past and

present residents of the surrounding community. In light of the Court's dismissal of the RCRA and pendent claims, the Court finds that certification of a class at this time would not be appropriate. Relatively few questions of law and fact remain, and it is not evident how the remaining claims could be more fairly and efficiently maintained by a class. The request for certification is therefore DENIED.

VI. FURTHER SCHEDULE

As indicated in the conference on June 8, 1988, the plaintiffs shall have twenty (20) days from the entry of this Opinion and Order to file a motion for reconsideration. The Court understands that the plaintiffs will limit the discussion to the dismissal of claims under RCRA § 7003. The defendants shall oppose the motions of reconsideration within 40 days of the entry of this Opinion and Order. In addition, defendants are granted 20 days to file motions for reconsideration of the partial denial of their motions; and the plaintiffs are granted 40 days from the entry of this Opinion and Order to oppose.

The Clerk shall act accordingly.

IT IS SO ORDERED.

APPENDIX D

STATUTORY PROVISIONS

Section 1004 of the Resource Conservation and Recovery Act, 42 U.S.C. 6903, provides in pertinent part:

> (5) The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical or infectious characteristics may—
>
> > (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
> >
> > (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.
>
> * * * *
>
> (27) The term "solid waste" means any garbage, refuse, sludge, from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 402 of the Federal Water Pollution Control Act, as amended (86 Stat. 880), or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923).
>
> * * * *

Section 1006 of the Resource Conservation and Recovery Act, 42 U.S.C. 6905, provides in pertinent part:

> (a) APPLICATION OF ACT.— Nothing in this Act shall be construed to apply to (or to authorize any State, interstate, or local authority to regulate) any activity or substance which is subject to the Federal Water Pollution Control Act (33 U.S.C. 1151 and following), the Safe Drinking Water Act (42 U.S.C. 300f and following), the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1401 and following), or the Atomic Energy Act of 1954 (42 U.S.C. 2011 and following) except to the extent that such application (or regulation) is not inconsistent with the requirements of such Acts.
>
> (b) Integration with Other Acts.—
>
> (1) The Administrator shall integrate all provisions of this Act for purposes of administration and enforcement and shall avoid duplication, to the maximum extent practicable, with the appropriate provisions of the Clean Air Act (42 U.S.C. 1857 and following), the Federal Water Pollution Control Act (33 U.S.C. 1151 and following), the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 135 and following), the Safe Drinking Water Act (42 U.S.C. 300f and following), the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1401 and following) and such other Acts of Congress as grant regulatory authority to the Administrator. Such integration shall be effected only to the extent that it can be done in a manner consistent with the goals and policies expressed in this Act and in other acts referred to in this subsection.

* * * *

Section 7002 of the Resource Conservation and Recovery Act, 42 U.S.C. 6972, provides in pertinent part:

(a) IN GENERAL.— Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—

(1) (A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this Act; or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The dis-

trict court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 3008(a) and (g).

No. 89-1185

In The

Supreme Court of the United States

October Term, 1989

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY, et al.,

Petitioners,

v.

COMITE PRO RESCATE DE LA SALUD, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Resource Conservation and Recovery Act's domestic sewage exclusion for "solid or dissolved material in domestic sewage," 42 U.S.C. § 6903(27), applies only to "sanitary wastes" and, thus, does not include sewage from industrial facilities that contains a mixture of sanitary wastes (from such employee facilities as factory restrooms) and toxic wastes from industrial operations?

2. Whether the court of appeals was correct in relying upon long-standing Environmental Protection Agency regulations which allow mixed industrial and sanitary wastes to qualify for the domestic sewage exclusion only for purposes of the regulatory provisions of the Resource Conservation and Recovery Act and not for the remedial provisions of § 7003 of that Act?

PARTIES TO THE PROCEEDING

Respondents accept petitioners' list of the parties to the proceeding below.

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BRIEF IN OPPOSITION FOR RESPONDENTS

STATEMENT OF THE CASE

Petitioners include ten private industries ("private petitioners") that discharge toxic wastes from buildings built and owned by petitioner Puerto Rico Industrial Development Company ("PRIDCO"). The wastes are discharged into a sewer system operated by petitioner Puerto Rico Aqueduct and Sewer Authority ("PRASA"). The industrial operations and the sewer system in question are located in the Guanajibo Industrial Park near

Mayaguez, Puerto Rico ("Industrial Park"). The respondents are a community group and present and past workers at the Industrial Park who were severely injured by exposure, at their places of work, to toxic gases which escaped as a result of the discharges of toxic wastes by the private petitioners to a defective sewer system. The industries at the Industrial Park were the only users of the sewer system in question here. No private residences were connected to this sewer system.[1]

Respondents filed suit in the United States District Court for the District of Puerto Rico seeking, *inter alia*, to enjoin the threat to their health caused by petitioners' conduct and for imposition of civil penalties.[2] This injunction was sought pursuant to Sections 7002 and 7003 of the Resource Conservation and Recovery Act

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[1] In December, 1987, the sewer system at the Industrial Park was disconnected from the PRASA-operated sewage treatment plant, which processed only the wastes from the Industrial Park, and was connected to a sewer system which led to another PRASA-operated sewage treatment plant which processes wastes from many other sources, including residential sources. This change does not affect respondents' RCRA claims arising before December, 1987.

[2] In their action before the district court, respondents also alleged violations of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* and the permitting and other regulatory requirements of RCRA, 42 U.S.C. §§ 6922, 6924, 6925 and 6930. Respondents also sought damages and other relief under the common law of Commonwealth of Puerto Rico. Those claims are not at issue here. Respondents' common law claims, for which pendent jurisdiction was sought, were dismissed only because of the district court's rejection of the RCRA claims and, upon reinstatement of those claims, the pendent claims would be revived.

("RCRA"), 42 U.S.C. §§ 6972 and 6973, which allow private citizens to sue to seek to abate an imminent and substantial endangerment created by the handling or disposal of solid or hazardous wastes.[3]

When Congress enacted RCRA, 42 U.S.C. §§ 6901 *et seq.*, it broadly defined "solid waste" to include:

> . . . any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, ...

42 U.S.C. § 6903(27).[4] Congress also specified certain narrow exceptions to this broad definition. One of those exceptions, known as the Domestic Sewage Exclusion ("DSE"), excludes "solid or dissolved material in domestic sewage" from the definition of "solid waste." *Id.* This case turns on the interpretation of that phrase.

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[3] Section 7002 of RCRA, 42 U.S.C. § 6972, authorizes citizens to bring suit to abate an imminent and substantial endangerment where suit could be brought by the Environmental Protection Agency under section 7003 of RCRA, 42 U.S.C. § 6973, and based on the same legal standards. S. Rep. No. 284, 98th Cong., 1st Sess. (1984) at 56-57. The court of appeals properly treated these sections as identical for all purposes relevant to this case. Pet. App. 14a-15a. In this brief, respondents refer to section 7003 only for simplicity of citation.

[4] "Hazardous wastes" are a subset of "solid wastes." 42 U.S.C. § 6903(5). If the substances disposed of by private petitioners and of concern to respondents are solid wastes, there is no controversy here that they are also hazardous wastes.

The court of appeals reversed the district court's grant of petitioners' motion for dismissal. Appendix A to Petitioners' Brief ("Pet. App."). The court of appeals held that the DSE, as set forth in RCRA, did not apply to a mixture of industrial and sanitary wastes discharged by industrial facilities to sewage treatment plants which received only wastes from those industrial sources. It further held that the Environmental Protection Agency ("EPA"), using the broad discretionary authority granted to it by Congress in RCRA, could choose to allow mixtures of sanitary and industrial wastes to qualify for the DSE for purposes of exempting such facilities from the *regulatory* provisions of RCRA, while refusing to allow such mixed wastes to be exempt from the section 7003 imminent and substantial endangerment provisions of RCRA.

The court also found that the highly general terms of the statute supported giving weight to the agency's interpretation of the terms of the statute. "[W]e interpret the statute as reflecting a congressional intent to give EPA considerable authority itself to interpret language like 'domestic sewage' and thereby fix, at the boundaries, the precise scope of the exception." Pet. App. at 11A.

The court specifically rejected the petitioners' argument that 40 C.F.R. § 261.4[5], binds EPA and the court, in

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[5] 40 C.F.R. § 261.4 states:

(a) *Materials which are not solid wastes.* The following materials are not solid wastes for purposes of this part: (1)(i) Domestic sewage; and (ii) Any mixture of domestic sewage and other wastes that

(Continued on following page)

interpreting all provisions of RCRA, to a definition of "domestic sewage" that includes mixtures of industrial and sanitary wastes where both originate from industrial facilities. The court cited two reasons for rejecting petitioners' argument. First, the regulation explicitly does not apply to section 7003, but applies only to Subtitle C, the regulatory portion, of RCRA.[6] The court pointed out that a distinction between Subtitle C definitions and those for section 7003 made sense because of the distinctions between those two portions of RCRA. *Id.* at 15a.

> Subtitle C contains highly detailed recordkeeping, notification, and permit requirements; to ease administrative burdens, EPA may want to include those factory pipes that contain only a little sanitary waste, but exclude those that contain little else. Sections 7002 and 7003, on the other hand, are invoked only to respond to imminent and substantial endangerments to health or the environment; in such a context, involving a present threat to public welfare and no ongoing administrative duties, EPA may

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passes through a sewer system to a publicly-owned treatment works for treatment. "Domestic sewage" means untreated sanitary wastes that pass through a sewer system.

[6] 40 C.F.R. § 261.1(b)(1) provides that the regulation applies "only to wastes that also are hazardous for purposes of the regulations implementing Subtitle C of RCRA." 40 C.F.R. § 261.1(b)(2) further states that "[a] material which is not defined as a solid waste in this part, or is not a hazardous waste identified or listed in this part, is still a solid waste . . . if . . . in the case of section 7003 the statutory elements are established."

> want to include even those factory pipes that contain a relatively small proportion of industrial wastes.

Id. The court found nothing incongruous with EPA defining the domestic sewage exclusion in different ways in different contexts, particularly since Congress appears in this case to have implicitly delegated to EPA the authority to interpret the statute. *Id.* at 15a-16a.

In rejecting petitioners' argument concerning 40 C.F.R. § 261.4, the court also relied upon EPA's statement that the "definition simply refers to the kind of *residential* waste at issue." *Id.* at 14a. The fact that nothing is said about the source does not mean that it is irrelevant. *Id.*

In holding that mixtures of sanitary and industrial wastes are not exempted under the DSE from the remedial reach of Section 7003 of RCRA, the court of appeals also agreed with respondents and *amicus* EPA that the term "domestic sewage" should be read to mean sewage that comes from residences. The court found ample support for this conclusion. First, the court looked to the dictionary meaning of "domestic" which is " 'relating to the household or the family . . . connected with the supply, service and activities of households and private residences.' " Pet. App. at 10a *quoting* Webster's Third International Dictionary 671 (1976).

Second, the court looked to the language in the definition of "solid waste" and found that it referenced not only the type of waste but its source. Pet. App. at 10a. Therefore, looking to the context of the definition, "domestic" would appear to refer to the *source* of the waste.

Third, the court found that if one read the definition as referring only to the *type* of waste, rather than its source, then the Congressional purpose behind section 7003 of RCRA, to provide broad relief whenever an imminent and substantial endangerment was created, would become more difficult to achieve. *Id.* Since most industries have toilets for their workers, were the definition read to refer solely to the type of waste, potentially large amounts of waste might be exempted from the statute's scope, even though those wastes created an imminent and substantial endangerment. *Id.* at 10a-11a.

Fourth, the court read the legislative history of section 7003 as supporting the argument that the provision was to have a broad scope. Thus, "it would seem somewhat anomalous to interpret the *exception* broadly and thus significantly *narrow* the statute's broad reach." *Id.* at 11a.

The court of appeals reversed and remanded to the district court.

ARGUMENT

I. THERE ARE NO CONSIDERATIONS WHICH JUSTIFY GRANT OF THE PETITION.

The decision of the First Circuit is correct and does not conflict with the decision of any other federal court of appeals on the same matter. Nor do the petitioners argue that such a conflict exists.

The petition for *certiorari* provides no cogent justification for issuance of a writ. The petition, therefore, should be denied.

II. THE COURT OF APPEALS WAS CORRECT IN DETERMINING THAT THE DOMESTIC SEWAGE EXCLUSION DOES NOT PREVENT APPLICATION OF SECTION 7003 OF THE RESOURCE CONSERVATION AND RECOVERY ACT TO INDUSTRIAL WASTE STREAMS.

A. On Its Face, RCRA Does Not Support Petitioners' Contention That The Court Of Appeals Erred.

Petitioners offer as the core of their argument the proposition that the DSE is the boundary between regulation of the conduct of generators and disposers of hazardous wastes under the Clean Water Act and regulation of such conduct under RCRA. However, the provision of RCRA at issue in this case, Section 7003, is not the permitting section. Section 7003, does "not regulate conduct but regulates and mitigates endangerments." *United States v. Waste Industries, Inc.*, 734 F.2d 159, 164 (4th Cir. 1984). Thus, petitioners' argument misses the mark.

Petitioners' argument ignores the critical language of the statute itself. Significantly, at no point in their brief do petitioners attempt to demonstrate how the DSE, as stated in the statute, applies to their mixture of industrial and sanitary wastes. The RCRA definition of "solid waste," of which "hazardous waste" is a subset, 42 U.S.C. § 6903(27), provides:

> The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant,

> water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, *but does not include solid or dissolved material in domestic sewage*, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of Title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923).

42 U.S.C. § 6903(27) (emphasis added).

This definition excludes from "solid waste" "solid or dissolved material in domestic sewage." It is clear on its face that the exception as stated by Congress refers only to *domestic* sewage. It does not refer to *industrial* discharges. The court of appeals so held. Pet. App. at 10a-13a. Since 1980, when EPA promulgated the implementing regulations of RCRA, EPA has defined domestic sewage as "sanitary wastes," 40 C.F.R. § 261.4(a)(1)(ii) (1987), a definition which petitioners accept. Industrial discharges such as those of petitioners are not "sanitary wastes." That they are not is clear from the fact that industrial discharges are subject to a further separate exception in the same statutory definition, which excludes from RCRA coverage "industrial discharges which are point sources subject to permits under section 1342 of Title 33 . . . ," that is, section 402 of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* 42 U.S.C. § 6903(27).[7]

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[7] Domestic wastes can also be subject to section 402 of the Clean Water Act but, significantly, Congress did not include

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Petitioners ignore this central argument concerning the language of the statute itself and focus instead on the portion of the court of appeals opinion which equates "domestic wastes" with its preferred dictionary definition, "household wastes." Petitioners argue that because other sections of RCRA and other environmental statutes use the phrase "household wastes" and 42 U.S.C. § 6903(27) does not use that phrase, "domestic sewage" must not be synonymous with "household wastes."[8]

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them within the section 402 exception. Clearly, Congress intended to exclude all domestic wastes from the definition of "solid waste" but intended to exclude industrial wastes only under certain limited exceptions. If, as petitioners argue, domestic wastes include industrial wastes, then there would have been no need to include the section 402 exception.

[8] Petitioners also claim that EPA announced for the first time in its *amicus* brief that it believed that "domestic" wastes meant only "household" wastes. In fact, several years ago, EPA promulgated and issued *Guidance For Implementing RCRA Permit-By-Rule Requirements At POTWs* (July 21, 1987) in which it concluded that:

> Industrial waste which mixes with sanitary waste from on-site sanitary facilities for the employees does not necessarily fall under the domestic sewage exemption. In order to qualify for the domestic sewage exemption, the industrial waste must also mix in the municipal sewer system with untreated sanitary wastes from non-industrial sources.

Id. at 6. Although this guidance document is not a regulation, as its preamble indicates, it does nonetheless represent an EPA interpretation of its own regulations which substantially predates the filing of its *amicus* brief here. Contrary to petitioners'

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Whether domestic sewage includes both sanitary wastes from households and sanitary wastes from industrial operations is not controlling here because the wastes of concern in this case are the industrial wastes which were also discharged from the private petitioners' facilities. The unassailed and unassailable fact is that, on its face, the statutory definition of the DSE only excludes sanitary and not industrial wastes or mixtures of industrial and sanitary wastes from the definition of solid waste. Respondents here are complaining about the industrial wastes discharged into the sewer system and not the sanitary wastes.

Petitioners argue that the reason the DSE exists is because the Clean Water Act already regulates "solid and dissolved material in domestic sewage" by providing for pretreatment of all wastes discharged to sewer lines. Petitioners make a fatal error in this argument because the

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assertion, the document was "published" in that it was available to the general public and was distributed to all EPA regional offices and state personnel.

Such interpretations by an agency of its own regulations are entitled to substantial deference by reviewing courts. *See Northern Indiana Pub. Serv. Co. v. Isaac Walton League of America*, 423 U.S. 12, 15 (1975) (*per curiam*); *Buschmann v. Schweiker*, 676 F.2d 352, 355 (9th Cir. 1982).

In its *amicus* brief EPA also cited several additional regulations and pre-existing agency policies in which EPA had treated sanitary wastes from industrial sources differently than sanitary wastes from households. Brief for United States As Amicus Curiae at 20-22. These additional regulatory positions give added weight to the EPA's administrative interpretation of the DSE contained in the above-noted guidance document.

pretreatment provisions of the Clean Water Act only apply if wastes are being discharged to a publicly owned treatment works ("POTW"). 33 U.S.C. § 1317(b). There is no requirement in the statutory DSE that the wastes be discharged to a POTW. Thus, if the DSE is read to include industrial wastes, it would exclude from RCRA both pretreated and non-pretreated industrial wastes. Such a massive loophole was never intended by Congress and petitioners could not and do not urge its existence.

The statutory language alone, therefore, cannot support petitioners' conclusion that the court of appeals erred in concluding that the discharges of hazardous waste at issue here are not covered under section 7003.

B. EPA's Regulations Do Not Support Petitioners' Contention That The Court Of Appeals Erred.

Petitioners attempt to escape the clarity of the statutory language by relying on a regulation promulgated by EPA in 1980 and consistently applied by EPA since that time. The regulatory provision, found in 40 C.F.R. § 261.4(a)(1) (1987), defines "solid wastes" to exclude domestic sewage and "any mixture of domestic sewage and other wastes that passes through a sewer system to a publicly-owned treatment works for treatment." It is this regulatory language, and only this language, which could provide a basis for the exclusion of a mixture of domestic and industrial wastes from the definition of solid waste in RCRA.[9] However, this mixed waste extension of the DSE,

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[9] In the explanation accompanying these regulations, EPA makes clear that the "other wastes" which must mix with

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and the regulatory definition of "solid waste" of which it is a part, explicitly do not apply to Section 7003.

This mixed waste extension of the DSE upon which petitioners have relied appears in 40 C.F.R. Part 261. Part 261, however, includes the following statement in the "Purpose and scope" section:

> This part identifies only some of the materials which are solid wastes and hazardous wastes under sections 3007, 3013, and 7003 of RCRA. A material which is not defined as a solid waste in this part, or is not a hazardous waste identified or listed in this part, is still a solid waste and a hazardous waste for purposes of these sections if:
>
> * * *
>
> (ii) In the case of section 7003, the statutory elements are established.

40 C.F.R. § 261.1(b)(2) (1987).

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domestic sewage to qualify for the DSE include discharges from industrial facilities. EPA Regulations, Hazardous Waste Management System, Identification and Listing of Hazardous Waste, 45 Fed. Reg. 33084, 33097 (May 19, 1980) ("Regulations"). Of course, if such discharges were already covered by the statutory DSE, there would have been no need for EPA to provide this expanded definition or to go to such lengths to justify the extension of the DSE to mixed waste streams. EPA was obviously aware of the fact, cited by petitioners, that industrial dischargers always include some non-industrial wastes from their plant bathrooms in their sewer discharges. Nonetheless, EPA felt compelled to write a specific regulation to cover discharges from industrial operations which mix with domestic wastes in a sewer system, obviously referring to wastes coming from places other than the industrial facilities themselves.

When it adopted this language, EPA made clear its intent, based upon its analysis of Congress' intent, that section 7003 operate unrestricted by the regulatory limitations on the definition of hazardous and solid wastes contained in Part 261.

> Second, although this regulation limits what may be regulated as a "hazardous waste" under Sections 3002 through 3005 and 3010 of RCRA,[10] *it does not limit* those materials which may be considered "hazardous wastes" under other sections of the statute, particularly Section 3007 (which authorizes EPA to obtain information on "hazardous waste" in order to develop regulations or enforce RCRA) and Section 7003 (which authorizes the Agency to institute civil actions to abate imminent and substantial hazards caused by "hazardous wastes"). Unlike Sections 3002 through 3004 and Section 3010, Congress did not confine the operations of Sections 3007 and 7003 to "hazardous wastes *identified or listed under this subtitle*" (emphasis added). To avoid future confusion on this point, EPA has stated it explicitly in § 261.1(b).

Regulations, 45 Fed. Reg. 33084, 33090 (May 19, 1980) (first emphasis added; second emphasis in original). The court of appeals specifically cited this portion of the regulations in rejecting petitioners' arguments. Pet. App. at 14a-15a.[11]

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[10] Sections 3002-3005 and section 3010 of RCRA, 42 U.S.C. §§ 6922-25 and 6930, refer to permitting and notification requirements under RCRA.

[11] Petitioners argue that the First Circuit inappropriately allowed the EPA's long-standing mixed waste extension of the DSE to draw a distinction between the DSE as it applies to

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In short, the industrial wastes discharged to the sewer system in the Industrial Park are solid and hazardous wastes for purposes of section 7003 if they meet the statutory definitions of solid and hazardous wastes. The industrial discharges are not subject to any regulatory extension of the DSE. Since the definition of solid waste contained in RCRA includes "solid, liquid, semisolid, or contained gaseous material resulting from industrial . . . operations," only excluding industrial discharges if they are regulated point sources under the Clean Water Act, and since petitioners' discharges meet this definition of "solid wastes," section 7003 is applicable to those discharges.

III. THE COURT OF APPEALS WAS CORRECT IN RELYING UPON THE EPA POSITION ARTICULATED IN ITS *AMICUS CURIAE* BRIEF BECAUSE IT IS LONG-STANDING AGENCY POLICY.

Petitioners argue that EPA announced for the first time in its *amicus* brief below its position on the definition of the DSE and its applicability to section 7003. Brief of Petitioners at 29 n.28. Petitioners assert that it is inappropriate for the court to rely on such allegedly newly-articulated views as agency policy. However, the long-standing regulatory history of the mixed waste extension

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wastes subject to regulation under 42 U.S.C. §§ 6922-6925, 6930 (the regulatory provisions) and wastes subject to the remedial authority of 42 U.S.C. § 6973. If petitioners thought that distinction was untenable, the time to challenge it was in 1980, when the regulation was promulgated. RCRA specifically forbids challenging the validity of a regulation in an action, such as this one, to enforce the provisions of the act against regulated companies. 42 U.S.C. § 6976(a).

of the DSE, 40 C.F.R. § 261.4 (1987), confirms that it was intended to apply only to the regulatory provisions of Subtitle C of RCRA and not to section 7003.

In enacting the mixed waste stream extension of the DSE in 1980, EPA focused on the fact that industrial wastes that enter the sewer system and then mix with domestic wastes will qualify for the DSE only if they are regulated under the Clean Water Act through its regulation of sewage treatment plant operations and through its imposition of pretreatment requirements on POTWs. Regulations, 45 Fed. Reg. 33084, 33097 (May 19, 1980). Regulation under the Clean Water Act provided EPA with the confidence that the wastes would "be properly treated" and that the "administrative clarity [created by not seeking to use RCRA to regulate industrial waste streams before they mix with domestic wastes] in this otherwise complicated regulatory program warrants such an approach." *Id.*

This articulation of EPA policy occurred ten years ago and EPA has never deviated from it. The concern about administrative clarity and desire to draw a clear line between the Clean Water Act and RCRA only makes sense in the context of, and was only intended to cover, the regulatory provisions of RCRA contained in Subtitle C and not the remedial provisions of section 7003 contained in Subtitle G of RCRA. Section 7003 applies only after the discharge has occurred and only if an imminent and substantial endangerment is created.[12] It is for this

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[12] In order to ensure that, regardless of compliance with any other provision of RCRA, no hazardous wastes would

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reason that Section 7003 is viewed as remedial and not regulatory. As the Fourth Circuit has stated: "section 7003 appears in subtitle G, and it is designed to deal with situations in which the regulatory schemes break down or have been circumvented." *United States v. Waste Industries, Inc.*, 734 F.2d at 164. It is also for this reason that the policy favoring a mixed waste extension of the DSE is inapplicable to section 7003. It is only when the regulatory reach of the Clean Water Act that justified the mixed waste extension has failed to protect the public health and safety by failing to "properly" treat the wastes that Section 7003 applies or would be needed.[13]

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endanger human health or the environment, Congress enacted section 7003 of RCRA, 42 U.S.C. § 6973, which provides that "[n]otwithstanding any other provision" of RCRA in any situation where the handling, treatment, storage, or disposal of hazardous wastes might create an "imminent and substantial endangerment to health or the environment," action can be taken to abate the endangerment. This provision has been found by courts to be "a broadly applicable section dealing with the concerns addressed by the statute as a whole," *United States v. Waste Industries, Inc.*, 734 F.2d 159, 164 (4th Cir. 1984), and one which "does not regulate conduct but regulates and mitigates endangerments." *Id.* Congress has declared that the "primary intent of the provision [section 7003] is to protect human health and the environment." S.Rep.No. 284, 98th Cong., 1st Sess. at 59 (Oct. 28, 1984).

[13] Petitioners' anxiety about the implications of confirming that section 7003 of RCRA can apply to discharges to sewer systems is unwarranted. Because this section is designed to address conditions created by discharges of hazardous wastes,

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Further confirmation of the long-standing EPA position that the provisions of sections 7003 are available to address problems created even where the DSE applies is found in the report issued by EPA in response to the Congressional direction to EPA to study the effect of the DSE and recommend any legislative changes it believed were required. Report to Congress on the Discharge of Hazardous Wastes to Publicly Owned Treatment Works (The Domestic Sewage Study), February 1986. This EPA report generally supported the continued use of the DSE, although it noted that discharges of hazardous wastes to sewer systems could and had produced releases of toxic gases which could be harmful to the public. Domestic Sewage Study at 1-11, 4-8, 4-9. One significant basis for EPA's willingness to continue the DSE, while studying

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"notwithstanding" compliance with all regulatory provisions, Congress has already decreed that those who generate or dispose of hazardous wastes may be liable if the consequence of their lawful conduct is to endanger human lives. Petitioners are no more at risk than any other hazardous waste generator or disposer. Congress has properly concluded that the human health risk is more important to abate than the convenience of those causing that risk. In addition, petitioners argue that their discharges are subject to the Clean Water Act imminent and substantial endangerment provision which, if a correct interpretation of the Clean Water Act, would mean that petitioners would be subjected to the same inconvenience of being forced to abate an imminent and substantial endangerment even though they were in full compliance with all regulatory requirements. The imminent and substantial endangerment provisions of the Clean Water Act and RCRA provide identical remedies. Section 504 of the Clean Water Act, 33 U.S.C. § 1364, and Section 7003 of RCRA, 42 U.S.C § 6973.

the problem further, was a determination that, without statutory changes, existing controls provided a mechanism to address the problems caused by a release of toxic gases from a sewer system. Domestic Sewage Study, E-5 to E-6. In particular, the report concluded that section 7003 of RCRA was available to address problems created by the release of toxic gases from a sewer system where the DSE applies:

> In addition, in appropriate cases, the Agency may address air emission problems using § 7003 [of RCRA] where those problems may present an imminent and substantial endangerment of human health or the environment.

Domestic Sewage Study, at 6-46.[14]

In this context, it was entirely appropriate for the court of appeals to rely upon the *amicus* brief of the EPA. The purpose of *amicus* briefs is to provide courts with aid in analyzing legal questions. *Sony Corp. v. Universal Studios*, 464 U.S. 417, 434 n.16 (1984). Rather than being partisan, *amicus* briefs are intended to provide the court with information on matters of law about which there could be doubt or mistake. *New England Patriots Football*

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[14] Petitioners cite the Domestic Sewage Study to support the proposition that EPA did not believe there was any reason to change the DSE in 1986. From this correct summary of the findings of the study, petitioners then leap to the conclusion that therefore the decision of the court of appeals is erroneous because, they assert, it effected a change in the DSE. As the previous discussion demonstrates, the DSE does not and never has been intended to prevent the application of section 7003 to mixed industrial and sanitary wastes. Petitioners' assertion that such a determination represents a change in the DSE ignores the regulatory history of the DSE and is baseless.

Club, Inc. v. University of Colorado, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979). As the court of appeals in this case pointed out, Pet. App. at 17a, that is precisely the role which Congress explicitly anticipated for the EPA in the context of citizen suits:

> It is expected that EPA and the Department of Justice will carefully monitor litigation under this provision and file, where appropriate, *amicus curiae* briefs with the court in order to assure orderly and consistent development of caselaw in this area.

H.R. Rep. No. 198, 98th Cong., 1st Sess. 53 *reprinted in* 1984 U.S.Code Cong. & Admin. News 5576, 5612.

Whether agency interpretations are logically consistent with statutory language is one factor in determining whether weight should be given to agency interpretations. *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 41 (1981). As shown above, the *amicus* position is not inconsistent with either prior agency positions or the statute.

Petitioners also argue that an agency position that involves advocacy and nothing more is not entitled to deference when courts are construing a statute. Petitioners rely upon *Bowen v. Georgetown University Hospital*, 109 S. Ct. 468 (1988), for the proposition that the court will not rely on the litigating position of agency counsel, where the agency has not previously articulated an administrative position on the questions at issue. 109 S.Ct. at 473. The circumstances in *Bowen*, however, are significantly different than those in this case. In the first place, EPA is not attempting here a "post hoc" rationalization of its own actions. Second, EPA is not in the

position of defending a challenge to its own actions. Further, the present interpretation offered in its *amicus* brief is not contrary to prior EPA positions. There appears here to be no conflict with Congressional intent as was found in *Bowen*. Finally, unlike in *Bowen*, the position offered by EPA is a reasoned and consistent interpretation of the DSE and section 7003. The *Bowen* rationale, therefore, does not apply.

Similarly, *Investment Company Institute v. Camp*, 401 U.S. 617 (1971), also cited by petitioners, is inapposite. In that case, the Comptroller of the Currency had neither expressed a position nor provided any rationale for the questioned regulation until the regulation was challenged. The Court found the Comptroller's arguments in the litigation to be "post hoc rationalizations" which could not substitute for reasoned justifications offered in the course of adopting a regulation. The Court concluded that the regulation was invalid and a violation of the banking laws. There is here no issue of whether an EPA regulation is invalid or violative of the environmental laws. EPA is not in the position of offering "post hoc rationalizations" for its actions.

Since EPA's position is consistent both with its prior positions and with RCRA, the court of appeals was justified in giving the *amicus* brief deference.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

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February 21, 1990

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No. 89-1185

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY, *et al.*,
Petitioners,

v.

COMITE PRO RESCATE DE LA SALUD, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF FOR PETITIONERS

Respondents make three principal arguments. First, they contend that petitioners' discharges cannot fall within the domestic sewage exclusion because "domestic sewage" is defined as "sanitary waste," while petitioners' discharges are "industrial wastes." Second, they argue that EPA's regulatory definition of the DSE is consistent with the court of appeals' decision. Finally, respondents claim that the court of appeals did not err in relying upon the positions EPA advanced in its *amicus* brief below because those positions were consistent with EPA's longstanding agency policies. Each of these arguments is without merit.

A. Petitioners' Discharges Fall Within The Domestic Sewage Exclusion

Respondents attempt to carve a distinction between "domestic sewage" and "industrial discharges." "Domestic sewage," they argue, has been defined by the EPA as "sanitary wastes;" since "industrial discharges" cannot be sanitary wastes, respondents continue, they cannot be "domestic sewage" either and, therefore, cannot fall within RCRA's domestic sewage exclusion. Brief In Opposition For Respondents 9 ("Br. in Opp.").

Respondents overlook the language of the DSE, which excludes from RCRA's definition of solid waste "solid or dissolved materials *in* domestic sewage." 42 U.S.C. § 6903 (27) (emphasis added). The exclusion does not require that a discharge consist of sanitary wastes alone, but instead exempts any stream of waste where materials are commingled with sanitary wastes.[1] The waste stream at issue here fits squarely within this language.[2]

Respondents also argue that the DSE does not apply here because another clause of Section 1004(27) deals with industrial discharges, and it exempts only those "industrial discharges which are point sources subject to

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[1] Respondents make the puzzling argument (Br. in Opp. 8) that the DSE cannot serve as a boundary between RCRA and the Clean Water Act because RCRA Section 7003 is not RCRA's permitting section and therefore does not regulate conduct. In fact, RCRA Section 1004(27) sets the outer boundaries of Section 7003 (and all other relevant provisions of RCRA) by defining what is and what is not "solid waste" and, thus, hazardous waste. Section 7003(a), 42 U.S.C. § 6973(a), is controlled by § 1004(27) because § 7003(a) is confined in scope to enforcement actions involving "past or present handling, storage, treatment, transportation or discharge of any *solid waste* or *hazardous waste* . . ." (emphasis added).

[2] Respondents repeatedly attempt to draw a distinction between "domestic sewage" and "industrial waste." *See* Br. in Opp. 11, 12, 15, 16. In fact, the term "industrial waste" is nowhere defined, or even used, in RCRA.

permits" under Clean Water Act Section 402, 33 U.S.C. § 1342. Br. in Opp. 9. However, RCRA does not state that this "point source exclusion" is the only exclusion that applies to discharges from factories. In fact, the statutory scheme indicates the opposite because RCRA and the Clean Water Act overlap in more than one place. First, the Clean Water Act imposes pretreatment standards on those factories, such as petitioners', that discharge wastes to sewer systems serving POTWs. Section 307(b), 33 U.S.C. § 1317(b). Second, the Act requires factories that directly discharge wastes into navigable waters to obtain an NPDES permit from the EPA or qualified state regulator. Section 402, 33 U.S.C. § 1342. In each case, where the Clean Water Act regulates a waste stream, RCRA provides a corresponding exclusion. In view of Congress' specific direction that RCRA should not be construed to apply to "any activity or substance" already regulated by the Clean Water Act (RCRA Section 1006(a), 42 U.S.C. § 6905(a)), it is clear that different exclusions set forth in Section 1004 (27) can apply to different types of discharges from factories.[3]

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[3] Respondents also contend that petitioners' interpretation of the DSE would create a "massive loophole" because the pretreatment standards of the Clean Water Act apply only to wastes discharged to POTWs, while the district court's construction of the DSE would exempt all waste that is mixed with domestic sewage, even if it were not destined for a POTW. Br. in Opp. 11-12. The point source exclusion in Section 1004(27), however, precludes such a loophole. Thus, if a factory were a direct discharger of domestic sewage as respondents posit, it would be required to obtain a point source discharge permit and would fall under the point source exclusion.

Moreover, EPA's regulatory definition of the DSE directly addresses this issue. The regulation's exclusion of mixed waste streams covers "[a]ny mixture of domestic sewage and other wastes that passes through a sewer system *to a publicly-owned treatment works for treatment.*" 40 C.F.R. § 261.4(a)(1)(ii) (emphasis added).

B. The Court Of Appeals' Decision Is Not Consistent With EPA's Regulatory Definition Of The Domestic Sewage Exclusion

Respondents argue that EPA's regulatory definition of the domestic sewage exclusion, 40 C.F.R. § 261.4(a)(1), is consistent with the court of appeals' decision because the regulation does not apply to actions brought under RCRA Section 7003. Br. in Opp. 12-14. Respondents predicate their argument on a prefatory section of 40 C.F.R. Part 261, which states that the regulations identify "only some of the materials which are solid wastes" under RCRA and that "[a] material which is not defined as a solid waste in this part" is still a solid waste for purposes of Section 7003 "if the statutory elements are established." 40 C.F.R. § 261.1(b)(2).

Respondents confuse two different things. The purpose of Part 261 is to define generally the substances and materials that are to be considered "solid wastes" and "hazardous wastes." Thus, its Subpart A gives general definitions of those two terms, Subpart B sets forth criteria for identifying hazardous wastes, Subpart C describes characteristics of hazardous wastes, and Subpart D lists hazardous wastes. The prefatory section to Part 261 (§ 261.1(b)(2)) and the supplementary information EPA provided in its May 19, 1980 Notice of Final Rulemaking for Part 261 (the "1980 Notice") state, nevertheless, that the Part's listing of hazardous substances was definitive only for purposes of certain sections of RCRA, but not all. *See* 40 C.F.R. § 261.1(b)(2); 45 Fed. Reg. 33084, 33090 (May 19, 1980). In particular, the Part's listing of solid and hazardous wastes was not exhaustive for purposes of Section 7003. *Ibid.*

But Section 261.1(b)(2) and the 1980 Notice do not go so far as respondents claim. Section 261.1(b)(2) and the Notice state only that substances which are not defined as "solid" or "hazardous" wastes in Part 261 may still be considered solid or hazardous wastes under

Section 7003 under some circumstances. The Section and the Notice do not stand for the converse proposition, namely, that substances specifically defined as *not being* solid or hazardous wastes in Part 261 will nonetheless be so considered under Section 7003. Contrary to respondents' claim (Br. in Opp. 14), there is no evidence in Section 261.1(b)(2) or in the Notice that Section 7003 would operate completely unrestricted by EPA's regulatory definition of the domestic sewage exclusion.[4]

C. The Narrow Construction Of The Domestic Sewage Exclusion EPA Urged In Its Amicus Curiae Brief Below Was Not One That EPA Officially Adopted Or Consistently Held

Respondents argue that the court of appeals was correct in relying upon the positions the EPA advanced in its *amicus curiae* brief below because the construction of RCRA that EPA urged below was a longstanding one with the agency. In fact, respondents are unable to identify a single EPA rule or official pronouncement to support this claim. Although respondents contend (Br. in Opp. 10-11) that EPA's internal, typewritten *Guidance For Implementing RCRA Permit-By-Rule Requirements*

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[4] Later in their brief, respondents make the extreme argument that Section 7003 was drafted so broadly as to override *all* limitations in RCRA. *See* Br. in Opp. 16-17 n.12. Respondents base this claim on the Section's introductory language, which gives EPA's Administrator the right to bring certain enforcement actions "[n]otwithstanding any other provision" of RCRA if he finds "an imminent and substantial endangerment to health or the environment." Section 7003(a), 42 U.S.C. § 6973(a). A more logical reading of the Section is that this language is a reference to procedural limitations imposed on the Administrator elsewhere in RCRA. *See, e.g.*, RCRA Section 1006(b), 42 U.S.C. § 6905(b) (enjoining the Administrator to avoid regulatory duplication in enforcement of RCRA). Moreover, this language is found only in RCRA Section 7003, not in the citizen suit provisions of § 7002, 42 U.S.C. § 6972, upon which this lawsuit is based.

At POTWs was "published" because it was available to the general public and distributed to all regional EPA offices and state enforcement personnel, they do not provide a citation to any public source where the *Guidance* appeared, nor advance any authority for the proposition that internal agency documents setting forth enforcement positions should receive deference from courts.

Nor can respondents properly claim that the position EPA advanced below—that the domestic sewage exclusion is applicable only where waste from factories flows into a sewer system that also serves houses—is one EPA has consistently held. *See* Br. in Opp. 21. In fact, EPA's regulatory definition of the DSE has been otherwise for a decade, excluding from RCRA:

> (ii) Any mixture of domestic sewage and other wastes that passes through a sewer system to a publicly-owned treatment works for treatment. "Domestic sewage" means untreated sanitary wastes that pass through a sewer system.

40 C.F.R. § 261.4(a)(1). Likewise, EPA's Notice of Final Rulemaking for this regulation clearly stated that EPA read RCRA's domestic sewage exclusion broadly and that EPA thought this was Congress' intent.[5] Indeed,

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[5] EPA's 1980 Notice stated that:

> The exclusion of domestic sewage and mixtures that pass through sewer systems to POTW's is based on Congressional intent, not an Agency determination about the relative health and environmental risks presented by such waste streams. The Agency acknowledges that some mixtures of domestic sewage with other wastes may present environmental risks . . . . In response, the EPA can only assume that such factors were not determinative in the Congress' creation of the exclusion.
>
> The proposed regulation did not contain a specific definition of domestic sewage. *EPA believes that the definition of domestic sewage, and the provision relating to mixtures of wastes with domestic sewage, contained in these regulations is a rea-*

EPA wrote in the 1980 Notice that its regulatory definition of domestic sewage was "a reasonable interpretation of RCRA's statutory language and legislative history." 45 Fed. Reg. 33084, 33098 (May 19, 1980).[6]

Respondents correctly state (Br. in Opp. 20-21) that Congress encouraged EPA and the Department of Justice to file *amicus curiae* briefs where appropriate to assure orderly and consistent development of the law. However, it is a long—and unprecedented—step from this proposition to the one the court of appeals adopted. Nowhere in the legislative history of RCRA or any other statute has Congress written that the positions the government takes in its *amicus* briefs are to be treated as

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sonable interpretation of RCRA's statutory language and legislative history.

45 Fed. Reg. 33084, 33098 (May 19, 1980) (emphasis added). According to the Notice, EPA considered defining domestic sewage in other ways, but did not. One of the alternative definitions was to

> (4) Link[] the exemption for mixtures to those that flowed into a "publicly-serving" or "constructed-to-serve-the-public" treatment works, rather than POTWs.

Ibid. This alternative definition—which EPA specifically rejected in its final rule—is substantially the same construction that EPA urged upon the court of appeals. *See* EPA Br. at 17-19.

[6] Respondents argue (Br. in Opp. 18-19) that evidence of EPA's consistency in its view is found in EPA's 1986 Report to Congress on the Discharge of Hazardous Wastes to Publicly Owned Treatment Works. Respondents claim that, since language in the Report states that Section 7003 is an authority "in appropriate cases" to address problems of wastes evaporating from sewers, the DSE could not apply here because these would be the very wastes the DSE was supposed to exclude altogether from RCRA. *Id.* at 19.

Respondents ignore the fact that EPA's Report addressed, in addition to the DSE itself, the broader issue of *all* hazardous wastes discharged to POTWs. *See, e.g.*, Report at 6-1, 7-1. Consequently, there would be no anomaly in using Section 7003 to address discharges not exempted by the DSE.

if they were agency regulations, rulings or administrative practice. In and of itself, an agency *amicus* brief is entitled to deference only for the power of its arguments, and nothing more.

D. Certiorari Should Be Granted Because The Decision Below Conflicts With Applicable Decisions Of This Court

Respondents argue that the petition should not be granted because there is no conflict among the circuits in construing the domestic sewage exclusion. Br. in Opp. 7-8. However, the considerations that guide the Court's discretion are broader than that. The court of appeals decided that arguments advanced in a government agency's *amicus curiae* brief were entitled to the same deference that a court would ordinarily give to an agency's regulations, interpretive rules or longstanding practice.[7] *See* Pet. App. 11a-16a. This is flatly in conflict with the clear precedents of this Court. *See Bowen v. Georgetown University Hospital*, 109 S. Ct. 468, 473 (1988); *Investment Company Institute v. Camp*, 401 U.S. 617, 626-28 (1971). Indeed, the court of appeals' error was compounded by the fact that, not only did it give "considerable weight" (Pet. App. 13a) to EPA's positions, but it also gave this weight to agency positions that were inconsistent with those the EPA previously had espoused. *See* pp. 6-7 n.5, *supra*. *See Bowen v. Georgetown University Hospital*, *supra*, 109 S. Ct. at 474; *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981); *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977). It is clear that the court of appeals has decided an important question of law "in a way that conflicts with applicable decisions of this Court." Sup. Ct. R. 10.1(c).

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[7] Indeed, the court of appeals wrote that the position of the EPA was the "most important[]" of all the reasons it relied upon in reversing the district court. Pet. App. 11a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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